

740
No. 2580

IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

COLUMBIA DIGGER COMPANY,
(a corporation),

Plaintiff in Error,

VS.

M. R. SPARKS and C. A. BLUROCK,

Defendants in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error from the United States
District Court for the Western District
of Washington, Southern Division

Filed

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Attorneys for the Defendants in Error.

*In the District Court of the United States for
the Western District of Washington, Southern
Division.*

COLUMBIA DIGGER CO., a Cor-
poration,

Plaintiff,

VS.

A. B. RECTOR and CHARLES
DALY, co-partners, doing busi-
ness under the firm name and
style of Rector & Daly, and M.
R. SPARKS and C. A. BLU-
ROCK,

Defendants.

Complaint

The plaintiff, for cause of action against the above named defendants, complains and alleges as follows:

I.

That the plaintiff is and at all times herein mentioned was a corporation duly incorporated, organized and existing under the laws of the State of Oregon, and having its principal office and place of business in the City of Portland, County of Multnomah and State of Oregon.

II.

That the defendants, A. B. Rector and Charles Daly, are and were at all the times herein mentioned, copartners doing business under the firm name and style of Rector & Daly, and engaged in a general

contracting business in the City of Vancouver, County of Clarke, State of Washington.

III.

That the defendants, M. R. Sparks and C. A. Blurock, are and were at all the times herein mentioned, residents and citizens of the City of Vancouver, County of Clarke, State of Washington.

IV.

That on and prior to the 6th day of May, 1911, the City of Vancouver, a municipal corporation of the County of Clarke and State of Washington, had taken the preliminary measures necessary to the creation of an improvement district, and providing for the improvement of East "B" street, in said City, and had passed the necessary resolutions, ordinances and orders to carry said improvement into effect, and to let and enter into a contract for the making of said improvement, and did on said date, in compliance with said resolutions, ordinances and orders, and in furtherance thereof, and in pursuance of the law in such cases made and provided, enter into a certain contract with the said copartnership of Rector & Daly, defendants above named, for the making and completion of said improvement on said East "B" street, a copy of which contract so entered into as aforesaid by the said City of Vancouver, Washington, with the said Rector & Daly, is hereto attached and marked Exhibit "A" and specially referred to and made a part hereof.

V.

That in pursuance of said resolutions, ordinances

and orders, and in conformity with the law in such cases made and provided, at the time of the making of said contract with said defendants, Rector & Daly, and in consideration thereof and in pursuance thereof and of the law in such cases made and provided, and for the protection of sub-contractors furnishing material under said contract, said defendants, Rector & Daly, were required to and did execute and deliver to said City of Vancouver their certain bond in the sum of Twenty Thousand Dollars (\$20,000.00) signed by the said defendants as principals, and by said defendants, M. R. Sparks and C. A. Blurock, as sureties, a copy of which bond is hereto attached, marked Exhibit "B" and especially referred to and made a part hereof. That said bond was duly approved by the City Attorney of the City of Vancouver, on May 10, 1911, and thereafter filed in the office of the City Clerk of said City of Vancouver, and during all the times herein mentioned was and now is in full force and effect.

VI.

That thereafter and in pursuance of said contract and in compliance therewith, and in carrying out its terms and conditions, said defendants, Rector & Daly, did undertake the improvement of said East "B" street, and did continue in the work of constructing said improvement of said East "B" street for some time thereafter and until about the 20th day of October, 1911.

VII.

That after said contract was made by said de-

fendants, Rector & Daly, with said City of Vancouver as aforesaid, and on or about the day of May, 1911, at Portland, Oregon, said defendants, Rector & Daly, made and entered into a verbal contract with the plaintiff, wherein and whereby said plaintiff agreed to furnish and deliver unto said defendants, Rector & Daly, crushed rock, material to be used in the construction of said improvement of East "B" street, at the agreed price of \$1.25 per cubic yard for all crushed rock delivered; delivery on board scow or barge at Vancouver dock in Vancouver, Washington.

That after said contract was made and entered into, and pursuant thereto, and during the progress of the work and improvement of said East "B" street by said Rector & Daly, the plaintiff, at the special instance and request of said defendants, Rector & Daly, furnished and delivered unto said defendants, Rector & Daly, 5,481.9 cubic yards of crushed rock at the agreed price of \$1.25 per cubic yard, amounting to the sum of \$6,852.38. That no part of said sum has been paid save and except the sum of Six Hundred Forty-nine and 25/100 Dollars (\$649.25), and a credit by discount of Thirteen and 25/100 Dollars (\$13.25), or a total credit of Six Hundred Sixty-two and 50/100 Dollars (\$662.50).

That there is now due and owing from said defendants and each of them to this plaintiff the sum of Sixty-one Hundred Eighty-nine and 88/100 Dollars (\$6,189.88), together with interest thereon at the rate of six per cent (6%) per annum from and

since the 27th day of September, 1911, until paid.

VIII.

That on or about the said 20th day of October, 1911, said defendants, Rector & Daly, notified said City of Vancouver that it was impossible for them to complete said contract for said work and construction on East "B" street, and said defendants, Rector & Daly, did then and there assign and turn over all the rights under said contract to said defendants, M. R. Sparks and C. A. Blurock, sureties as aforesaid, who did then and there take full charge of the work and complete the improvement of said East "B" street, under said contract.

IX.

That said defendants, M. R. Sparks and C. A. Blurock, thereafter and on or about November 20, 1911, notified said City of Vancouver that they had accepted said contract and the completion of the work thereunder, and demanded said City of Vancouver to turn over to them all bonds for the improvement of said street for work performed on and after October 20, 1911, including the twenty per cent (20%) reserved by the city as a penalty to complete the contract. That said City of Vancouver permitted said defendants, M. R. Sparks and C. A. Blurock, to complete said contract, and thereafter delivered unto said defendants, M. R. Sparks and C. A. Blurock, and for their benefit, all the money and bonds remaining unpaid for such improvement, amounting to about Eleven Thousand Six Hundred Thirty-three and 98/100 Dollars (\$11,633.98).

X.

That all of said material was actually used in and became a part of said construction and improvement of East "B" street, as aforesaid, and the last material was furnished and delivered on September 27, 1911.

XI.

That said plaintiff, within thirty days from the date of the last delivery of material under said agreement with said defendants, Rector & Daly, as aforesaid, and within thirty days after the completion of said contract and acceptance of the work by said City of Vancouver, duly notified said City of Vancouver, State of Washington, and said defendants, M. R. Sparks and C. A. Blurock, sureties as aforesaid, and each of them, in writing, that plaintiff had furnished material to said defendants, Rector & Daly, pursuant to verbal agreement between them, for the improvement of said East "B" street, Vancouver, and that plaintiff claimed a balance due of Sixty-six Hundred Ninety-three and 68/100 Dollars (\$6,693.68), which was due and owing, and that said defendants, Rector & Daly, refused to pay same and that said amount was unpaid. That notice of said claim against said bond was duly presented to and filed with the City Clerk of City of Vancouver, State of Washington, within said period of thirty days after completion of said work under said contract and acceptance thereof by said City of Vancouver.

XII.

That plaintiff has heretofore demanded of said defendants and each of them, payment of its claims as aforesaid. That no part of said claims or said Twenty Thousand Dollars (\$20,000.00) set forth in said bond has been paid to this plaintiff.

WHEREFORE, plaintiff demands judgment against said defendants, Rector & Daly, and M. R. Sparks and C. A. Blurock, and each of them, in the sum of Sixty-one Hundred Eighty-nine and 88/100 Dollars (\$6,189.88), together with interest thereon at the rate of six per cent (6%) per annum from September 27, 1911, until paid; and for the costs and disbursements herein.

GILTNER & SEWALL,

Attorneys for Plaintiff.

Exhibit "A"

THIS AGREEMENT made and entered into this 6th day of May, A. D. 1911, by and between A. B. Rector and Charles Daly, copartners doing business under the firm name and style of Rector & Daly, both of the City of Vancouver, County of Clarke, and State of Washington, parties of the first part, and the City of Vancouver, a municipal corporation duly organized and existing under and by virtue of the laws of the State of Washington and located in the County of Clarke and State of Washington, party of the second part

WITNESSETH, That WHEREAS, said party of the second part has heretofore duly and legally

adopted a proper resolution of intention and passed a proper ordinance providing for the improvement of East "B" street in said City of Vancouver from the north line of 5th street in said city to the south line of 26th street in said city, and

WHEREAS, said party of the second part by its proper and duly authorized officers, advertised for bids for furnishing all materials and performing all labor necessary for improving said "B" street as above indicated, and

WHEREAS, said parties of the first part at the time of receiving said bids, submitted the lowest and best bid for excavating, surfacing, grading and paving said street and furnishing all the materials required by the plans and specifications for the improvements on the aforesaid street according to the plans and specifications thereof on file in the office of the City Clerk in said City of Vancouver, and

WHEREAS, at a regular meeting of the City Council in the said City of Vancouver, held on the 1st day of May, 1911, the above named Rector & Daly, parties of the first part, were awarded the contract for performing all labor and furnishing of all material required for said improvement;

NOW, THEREFORE: In consideration thereof and said agreements hereinafter contained for the said parties of the first part hereby agree as follows:

Said parties of the first part agree to furnish all materials and labor necessary for all improvements to be made on said street as aforesaid, the same

being known as Local Improvement District No. 58, in said city.

Said parties of the first part agree that the materials and work to be performed and the time and manner of furnishing and performing the same shall, in all respects, conform to the plans and specifications for the said work which said plans and specifications for the said work are now on file with the City Clerk of the said City of Vancouver, and are hereby referred to and made a part of this contract as fully as if the same were written out in full herein, and said materials and work shall be subject to inspection by the City Engineer of the said City of Vancouver or his deputy; and

The parties of the first part agree to furnish a bond for the faithful performance of the agreement to be duly approved by the proper officials in the said City of Vancouver, in the sum of Ten Thousand (\$10,000.00) Dollars, said bond to be in proper form to indemnify the said city for the faithful performance of this agreement; and

The parties of the first part shall also give their bond to the said city in the sum of Seventeen Thousand (\$17,000.00) Dollars, for the benefit of all material men, laborers, sub-contractors, and the payment of all debts incurred in the performance of this contract.

It is further understood and agreed between the parties hereof that the work herein contracted for shall be completed on or before the 1st day of July, A. D. 1911, and that said first parties shall com-

mence the construction of the sidewalks and curbs in said street under this contract before the 10th day of May, 1911, and that the same shall be completed on or before the first day of July, 1911, and that in case of failure of said parties of the first part to complete said work on or before the 1st day of July, 1911, then shall be deducted the sum of Ten (\$10.00) Dollars per day that said work remains uncompleted after said 1st day of July, 1911.

It is further understood and agreed that in case of said failure of the said parties of the first part to comply with the stipulation hereto, the City of Vancouver shall have the right to complete the work by purchasing the necessary materials and employing day labor or by sub-contract, or in any other manner as it may elect, and that the said parties of the first part shall be charged with any pay for any excess of cost over the contract prices herein resulting from said failure. It is further understood and agreed that said parties of the first part are to do and perform all things that are necessary to be done for the completion of the improvement according to the plans and specifications aforesaid.

Second party agrees to pay said parties of the first part for the said materials and labor in the manner following, namely:

Excavation per cubic yard	55 cents
Embankment excess per cubic yard	55 “
Concrete curb straight, per lineal foot	35 “

Concrete curb circular, per lineal foot	50	“
Concrete sidewalk per square foot	10 $\frac{1}{2}$	“
8-inch cast iron pipes in place, per lineal foot	75	“
6-inch cast iron pipes in place, per lineal foot	60	“
Box Culverts, per M. feet board measure	\$17.00	
Cross walks per M. feet board measure	17.00	
Catch basins complete, each..	60.00	
Inlets complete, each	20.00	
Cesspools complete, each.....	69.00	
Macadam in place, per square yard, tarvierized	64 $\frac{1}{2}$	cts.
Macadam in place, per square yard, bitumened	64 $\frac{1}{2}$	“

Said prices to include all material and labor expended in connection with this work by said parties of the first part; payments under the contract are to be made by said second party every thirty days on estimates furnished by the City Engineer in charge of the work. Twenty per cent of the estimates shall be withheld until the contract is fully completed and accepted by the city.

The party of the second part is to issue local improvement bonds on the local improvement fund for said local improvement district of said city for all sums of money to be paid to said parties of the first part under this contract, and said parties of

the first part herein agree to receive and accept said local improvement bonds for all sums of money which they are to receive from said party of the second part under this contract.

IN WITNESS WHEREOF, the said parties of the first part have hereunto affixed their names in duplicate, and said party of the second part has caused its name and corporate seal to be affixed in duplicate by Mayor and City Clerk, on the day and year first above written.

RECTOR & DALY,

By A. B. RECTOR, Mgr.

THE CITY OF VANCOUVER,

By JOHN P. KIGGIN,

Attest:

Mayor.

JAS. P. GEOGHEGAN,

City Clerk.

(SEAL)

Exhibit "B"

KNOW ALL MEN BY THESE PRESENTS, That we, A. B. Rector and Charles Daly, copartners doing business under the firm name and style of Rector & Daly, of Vancouver, Washington, as principals, and M. R. Sparks and C. A. Blurock, as sureties, are held and firmly bound unto the City of Vancouver in the penal sum of \$20,000, lawful money of the United States of America, for the payment whereof, well and truly to be made, we and each of us, jointly and severally, bind ourselves, our and each of our heirs, executors, administrators, firmly by these presents.

The condition of this obligation is such that WHEREAS the above bounden principals, Rector & Daly, did on the 6th day of May, A. D. 1911, enter into a contract with the City of Vancouver for the improvement of East "B" street, from the north line of 5th street to the south line of 26th street in said city according to the plans and specifications therefor,

NOW, THEREFORE, if the said contractors, Rector & Daly, shall well and faithfully perform all of the covenants and conditions in said contract mentioned and shall pay all claims for labor and work or material on account of sub-contractors, material men, laborers and mechanics furnishing labor and material under said contract, then this obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF the said parties have set their hands and seals this 6th day of May, A. D. 1911.

RECTOR & DALY,

By A. B. RECTOR, Mgr.

M. R. SPARKS.

C. A. BLUROCK.

Approved May 10th, 1911.

R. C. SUGG,

City Attorney.

STATE OF WASHINGTON,

COUNTY OF CLARKE, ss.

BE IT KNOWN that on this 6th day of May, 1911, M. R. Sparks and C. A. Blurock came before

me and being each duly sworn, each for himself deposes and says, that he is one of the sureties in the foregoing bond, that he is worth the sum of \$20,000 above all his debts, exemptions and liabilities.

M. R. SPARKS,
C. A. BLUROCK.

Subscribed and sworn to before me this 6th day of May, 1911.

JAS. P. STAPLETON,
Notary Public for the State of
Washington, residing at Van-
couver, Washington.

(SEAL)

(Duly filed).

(Title of the Court and Cause).

Answer of M. R. Sparks and C. A. Blurock

Come now the defendants M. R. Sparks and C. A. Blurock, and answering for themselves and no one else, deny, admit and allege as follows:

I.

These defendants deny each and every allegation contained in plaintiff's complaint except what is hereinafter admitted to be true.

II.

These defendants admit Paragraphs II, III, IV and VI of plaintiff's complaint.

III.

Answering Paragraph V of the complaint these defendants admit that said Rector & Daly were required to and did execute and deliver a bond to the

City of Vancouver, as alleged in said Paragraph, and that the bond was signed by the defendants Rector & Daly as principal and by M. R. Sparks and C. A. Blurock as sureties.

IV.

These defendants admit that the said Rector & Daly abandoned said contract and that these defendants completed the same.

V.

These defendants deny that they received \$11,633.98 from and on account of the completion of said contract, or any sum in excess of \$9,158.70, and that the money so received by them was used in completing the contract and paying for materials and labor which had gone into the street and for which they were held liable.

For a further and separate answer these defendants allege:

I.

That some time after the said Rector & Daly had entered upon the performance of the contract mentioned in the complaint and subsequent to the execution of the bond by these defendants and its approval by the City Attorney, and subsequent to its filing with the City Clerk, the plaintiff commenced furnishing material to the principal contractors for use in the improvement then in the course of construction on the street mentioned in the complaint.

II.

That at about the time the plaintiff commenced furnishing material to the principal contractors,

namely, Rector & Daly, for the improvement, the plaintiff and said principal contractors entered into an agreement that the plaintiff would furnish them material for the improvement then under way on the street mentioned and that the plaintiff would sell to said Rector & Daly crushed rock, sand, gravel and other material which said contractors might use for other purposes not in any way connected with this improvement, and that the payments which would be received from time to time from the improvement of the East "B" street in said city, and for which these defendants were sureties, on the bond of said Rector & Daly, should be applied to the general indebtedness of the said Rector & Daly, and that the plaintiff would look to the sureties for the pay for the material which was furnished to said East "B" street improvement; that said agreement was entered into after the execution and approval of said bond and with full knowledge on the part of the plaintiff that these defendants were sureties on the bond for the improvement of East "B" street in said city, and without any knowledge on the part of the sureties and without their consent or approval; that following the making of said agreement the plaintiff furnished material which was used in the improvement, the amount of which is unknown to these defendants, and received money from time to time from the principal contractors which was paid on account of the improvement, and that the entering into of said contract between the said principal contractors and the plaintiff without the knowledge

or consent or approval of these sureties was a fraud upon their rights and released them from liability.

For a second further and separate defense these defendants allege:

I.

That upon the entering into of the contract alleged in the complaint between Rector & Daly and the City of Vancouver, said Rector & Daly commenced to complete the improvement and continued work thereon until about the middle of October, 1911, when they abandoned the same and these sureties took charge of and completed the contract; that upon its final completion these defendants received the sum of \$9,158.70, which it was necessary for the defendants to use to pay the legal liabilities existing against the improvement and to pay for the completion of the contract.

II.

That after the contract mentioned in the complaint for the improvement of East "B" street had been entered into by the said Rector & Daly, the plaintiff commenced furnishing material for the completion of the improvement and continued furnishing material until shortly prior to the time these defendants took charge of the improvement; that these defendants have no means of knowing the amount of material furnished by said plaintiff.

III.

That an agreement was entered into between the plaintiff and said Rector & Daly that the money received from time to time for the improvement which

was to be paid and was paid to the plaintiff was to be applied on the general indebtedness of the said Rector & Daly which was unsecured, and that the plaintiff would hold these sureties liable for the material furnished for the improvement of East "B" street; that such agreement was entered into without the knowledge or consent of the sureties and that the payments made by the city on account of the improvement and which was paid to said Rector & Daly and by them to the plaintiff on account of the material furnished on said East "B" street improvement was applied by the plaintiff to the general indebtedness of the said Rector & Daly to the plaintiff and not on account of the material furnished for the improvement of said East "B" street; that the amount paid on account of the said improvement on East "B" street to the plaintiff amounted to a sum in excess of the amount now said to be due in plaintiff's complaint, viz., \$6,189.88, and plaintiff has received payments from money earned on said East "B" street improvement and paid to the principal contractors by the city and by the contractors to the plaintiff, a sum in excess of the amount claimed to be due by plaintiff, and plaintiff has been fully paid for all material furnished for the said East "B" street improvement in the said City of Vancouver, Washington, from money derived from said improvement.

IV.

That the said Rector & Daly were adjudged bankrupts by the Federal Court of this district shortly

after the said defendants undertook the completion of said contract and a trustee in bankruptcy appointed; and if these defendants are compelled to pay for the material furnished by the plaintiff they will be unable to recover anything from the said principal contractors and will suffer the entire loss if they are compelled to pay plaintiff, and that the plaintiff by reason of applying the money received on account of the said East "B" street improvement to the general indebtedness of said Rector & Daly and now holding these sureties for materials furnished for said East "B" street will be enabled to collect in full for the material sold to the said Rector & Daly and it will work a fraud upon these sureties.

WHEREFORE these defendants pray that they may go hence without day and for their costs and disbursements.

MILLER, CRASS & WILKINSON,
Attorneys for Defendants M. R.
Sparks and C. A. Blurock.

(Duly verified).

(Duly filed).

(Title of the Court and Cause).

Reply

Comes now the plaintiff above named and for reply to the answer of the defendants, M. R. Sparks and C. A. Blurock, denies each and every allegation contained in the first and second further and separate answer and defense therein and the whole

thereof, except as is admitted in the complaint, and alleges the facts to be as stated in its complaint.

WHEREFORE, plaintiff demands judgment as prayed in its complaint.

GILTNER & SEWALL,
EDWARD J. BRAZELL.

(Duly verified).

(Duly filed).

(Title of the Court and Cause).

Stipulation

IT IS HEREBY STIPULATED between the attorneys for the respective parties in the above entitled matter that this cause may be tried before the court without a jury, and that the trial set for Tuesday, October 28, 1913, be continued and tried before the Court without a jury whenever the Court can reach it after the close of the present jury session.

Dated this 21st day of October, A. D. 1913.

GILTNER & SEWALL,

Attorneys for Plaintiff.

MILLER, CRASS & WILKINSON,

Attorneys for Defendants M. R.

Sparks and C. A. Blurock.

(Duly filed).

(Title of the Court and Cause).

Findings of Fact and Conclusions of Law

And now on this day this matter coming on for hearing, the plaintiff appearing with it its attorneys, and the defendants M. R. Sparks and C. A. Blurock appearing, and with them their attorneys, and a

jury having been waived by stipulation of the respective parties, in writing, filed with the Clerk, and both sides being ready for trial, the testimony was taken and concluded, and the Court having taken the matter under advisement and the respective parties having submitted written briefs and the Court being now fully advised, finds:

I.

That the plaintiff is and at all times mentioned in the pleadings herein was a corporation duly incorporated, organized and existing under the laws of the State of Oregon and having its principal office and place of business in the City of Portland, County of Multnomah, State of Oregon.

II.

That the defendants A. B. Rector and Charles Daly are and were at all times herein mentioned, co-partners doing business under the firm name and style of Rector & Daly, and were engaged in the general contracting business in the City of Vancouver, Clarke County, State of Washington.

III.

That the defendants M. R. Sparks and C. A. Blurock are and were at all times herein mentioned residents and citizens of the City of Vancouver, Clarke County, State of Washington.

IV.

That no service of summons or complaint was made upon the defendants A. B. Rector and Charles Daly, and no appearance filed by either of said parties in this court, in this matter; that since the trial

and while the same has been under advisement plaintiff moved to dismiss as to the defendants A. B. Rector and Charles Daly and the Court finds that said motion should be granted.

V.

That the City of Vancouver, Washington, is a corporation organized under the laws of the State of Washington, and a city of the third class.

VI.

That prior to the 11th day of May, A. D. 1911, the City of Vancouver passed the necessary resolutions providing for the improvement of East B street in said city from the north line of Fifth street to the south line of Twenty-sixth street; that in pursuance to due and legal notice therefor a contract for the furnishing of material and performing of the work required by the plans and specifications on file in the office of the City Clerk was awarded to the defendants Rector & Daly.

VII.

That following the awarding of said contract to said defendants, said Rector & Daly entered into a contract with the City of Vancouver, Washington, for the furnishing of the material and performance of the work required by the plans and specifications; that in order to secure the faithful performance of the contract said Rector & Daly were required to furnish a bond as required by the provisions of Sections 1159, 1160 and 1161, Rem. & Bal.'s Code of the State of Washington, in the sum of Twenty Thousand Dollars conditioned as required by the

statutes referred to, and thereafter did file with the City Clerk of said City of Vancouver a bond conditioned as required with the defendants M. R. Sparks and C. A. Blurock as sureties.

VIII.

That following the execution of the contract and bond above mentioned said Rector & Daly entered upon the performance of such work and continued in the performance of the contract until about the 20th day of October, A. D. 1911, when they abandoned the same and the sureties on the bond, the defendants M. R. Sparks and C. A. Blurock, were required to complete the improvement, and the sureties, upon the abandonment of the work by the said Rector & Daly, took charge of the work and completed the improvement.

IX.

That while the said Rector & Daly were engaged in carrying out the said contract and making the improvement of the street mentioned they purchased from the plaintiff material to be used in the construction of said improvement, consisting of crushed rock, at the price of \$1.25 per cubic yard delivered; that in pursuance of said agreement the plaintiff furnished crushed rock to the said Rector & Daly, which was used in making the improvement of said street, amounting to the sum of \$6,852.38.

X.

That subsequent to entering into the contract with the City of Vancouver for the making of the improvement mentioned the said Rector & Daly en-

tered into an arrangement with the Vancouver Trust & Savings Bank of Vancouver, Washington, wherein the monthly estimates coming from said improvement were assigned to the Vancouver Trust & Savings Bank and in consideration thereof the said Vancouver Trust & Savings Bank advanced money from time to time to the said Rector & Daly for the carrying on of said contract and for the payment of the labor and material used and expended in the improvement; that the money received from the improvement by the said Vancouver Trust & Savings Bank and by it paid to the said Rector & Daly and to their creditors was a sum far in excess of the value and cost of material furnished by the plaintiff and used in the improvement mentioned.

XI.

That the said Vancouver Trust & Savings Bank paid to the plaintiff from time to time a sum in excess of the amount due plaintiff for the crushed rock furnished to said Rector & Daly and which was used in making the improvement of said East B street, and the money so paid to the plaintiff was money which was paid by the Vancouver Trust & Savings Bank against the estimates for the improvement as the work progressed, and estimates were furnished by the City Engineer, and the money paid to the plaintiff through said Vancouver Trust & Savings Bank was realized from the work and improvement of said East B street on account of which the defendants M. R. Sparks and C. A. Blurock were sureties and were the same moneys for

the collection and payment of which the sureties were obligated and that the amount thus paid to the plaintiff by the Vancouver Trust & Savings Bank from money earned from the improvement of said street was a sum in excess of the material furnished by plaintiff and used in making the improvement.

From the foregoing findings of fact the Court concludes:

I.

That the money received by plaintiff from the City of Vancouver on account of the improvement of said East B street, and paid to the plaintiff through the Vancouver Trust & Savings Bank, should be applied in payment for the material furnished by plaintiff and used in the improvement.

II.

That plaintiff has received on account of said improvement and from money earned in making the improvement a sum in excess of material furnished and used in the improvement and which fully satisfies and liquidates plaintiff's claim.

III.

That plaintiff's action should be dismissed and the defendants M. R. Sparks and C. A. Blurock have judgment for their costs and disbursements.

Dated this 25th day of July, A. D. 1914.

(Signed) EDWARD E. CUSHMAN,

Judge.

(Duly filed).

(Title of the Court and Cause).

Judgment

And now on this day this matter coming on for hearing before the Court upon the motion of the defendants, M. R. Sparks and C. A. Blurock, for judgment, and it appearing that the Court has heretofore made and entered Findngs of Facts and Conclusions of Law in this matter and that under such Findings of Fact and Conclusions of Law these defendants are entitled to judgment,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED That the plaintiff takes nothing, that the prayer of the plaintiff be denied, and that the defendants, M. R. Sparks and C. A. Blurock, have judgment for their costs and disbursements.

Dated this 25th day of July, A. D. 1914.

EDWARD E. CUSHMAN,

Judge.

(Duly filed).

(Title of the Court and Cause).

Bill of Exceptions

BE IT REMEMBERED, That heretofore and upon, to-wit, the 14th day of April, A. D. 1914, the above entitled cause came on duly and regularly for hearing in the above entitled court before HON. E. E. CUSHMAN, Judge of the above entitled Court, without a jury, a trial jury having been duly waived by written stipulation of the parties, duly filed with the Clerk before the commencement of said trial.

The plaintiff herein being represented by its attorneys and counsel, Messrs. Giltner & Sewall, and

The defendants herein being represented by their attorneys and counsel, Messrs. Crass & Wilkinson,

AND THEREUPON, The following proceedings were had and done, to-wit:

Counsel for the respective parties, having addressed the Court in an opening statement, the plaintiff herein, to further maintain the issues in its behalf, introduced the following evidence, to-wit:

DIRECT EXAMINATION.

It was stipulated that the plaintiff is a corporation, organized under the laws of the State of Oregon.

M. A. HACKETT was called as a witness on behalf of the PLAINTIFF, and being duly sworn, testified as follows:

I live in the City of Portland, Oregon, and am president and manager of the plaintiff. It is a corporation in the sand and gravel business, for producing and selling sand and gravel. Its place of business is Portland, Oregon. It was engaged in business in Portland in 1911.

I am acquainted with Mr. Rector, one of the defendants. Rector & Daly are a partnership. Their business in 1911 was general contracting and they were engaged in it at Vancouver, Washington.

Q. Did the Columbia Digger Company have any business with Rector & Daly in the early part of the year 1911, and if so, state what that business was?

A. Yes; Mr. Rector came over to our office in Portland in the early part of 1911, I think in the fore part of April, and wanted to make arrange-

ments for sand and gravel; he wanted to buy sand and gravel and for us to deliver it in Vancouver, and he also said that he had some contracts, or was about to get some contracts, where he was going to use about ten thousand yards of crushed rock, and he wanted to know what he could get his crushed rock for, and so I told him I would give him some sand and gravel, told him what I would give him sand and gravel for. "Now," he said, "I will have to pay cash for this sand and gravel, and I want it cheap for cash," and it was agreed that he would pay cash for it, and I told him he could have the gravel for eighty cents a yard, delivered on the bank or in the bunkers at Vancouver, and sand for sixty cents a yard, a very low price. Then he wanted to know what he could get the rock for, but as I was not in the rock business and had nothing to do with the rock business, I called up Mr. Hume, who was the agent for the Riverside Rock Company, and asked him what I could get crushed rock for in Vancouver. He said he could let us have crushed rock for eighty-five cents at the quarry, per yard, and I told Mr. Rector that I would boat it there, and unload and deliver it at Vancouver for forty cents per yard, which would make it a dollar and a quarter a yard.

Q. Well, state what occurred when you made the agreement with him for the sale of crushed rock for use on East B street, about what time and what the agreement was? .

A. Well, I think later, along some time in June, he stated that he wanted us to deliver him some

crushed rock, I think on Fourth Plain avenue and B street, and that he would be ready for rock at any time, so I called Mr. Hume to find out when he could make deliveries to us on the barges, and Mr. Hume wanted to know where we were going to get our money for this crushed rock. I called Mr. Hume, and we went over to Vancouver and saw Mr. Rector, and he said that he could not pay cash for the crushed rock, but as soon as he got his money off of B street, why he would pay for the crushed rock, and that he would have to ask us to wait for the money until he did get his money from B street, and we asked him what surety we would have if we waited for our money, and he said that he had a bond to the city to pay for all labor and material, a good bond, and mentioned who was on the bond, Mr. Blurock and a man named Sparks, I think, and so, under those conditions, we thought we were perfectly safe in furnishing him the rock and waiting until he got his money off B street, so we began to make deliveries as soon as we could.

We furnished Rector and Daly 5,481.9 yards of rock for use on B street at \$1.25 per yard. \$662.50 has been paid and the balance unpaid is \$6,189.88. The last delivery of rock must have been somewhere about the last of September or the first of October. I think September 27th is right. In rendering an account of this crushed rock to Rector and Daly there was no dispute about it. They admitted the account. They admitted to me that all of this rock went into the improvement of East B street. Rector

and Daly abandoned the work on East B street the fore part of October—along there. After they abandoned this work I had a notice served on the city and on the bondsmen. I have made a demand for the payment of this money from Rector and Daly personally. This money, which I just stated is due for crushed rock furnished East B street. I first made demand from them and then I made demand from the bondsmen. I do not know when I made it.

CROSS EXAMINATION.

I had the active control of this business while it was being carried on. I was the manager. Of course, I had my two sons working along with me under my directions, and they had a good deal to do with the management of it. There were just myself and my two sons.

I think we first started in on our arrangement of furnishing some sand and gravel before we furnished any crushed rock. We commenced furnishing sand and gravel as early as May. It may have been before that, but I think it was as early as that. We were paid for it as it was furnished, on the start. I think we began to deliver the rock for East B street to the bunkers there on barges the very last of June or the first of July; somewhere right close in there. I think we furnished some crushed rock before that, but I do not think that went on this street. I understood it went on Fourth Plain or some other street. Of my own knowledge I do not know where the first I furnished went. I know

about how many yards were furnished. Prior to the B street contract we furnished about 1,200 yards; three barge loads. I was told it went on Fourth Plain street. I could not tell exactly how many yards there were in that. I have not looked that up very closely—not lately. But I know there were three barge loads and that would be about 1,200 yards. We were paid for that the fore part of July. I think we were paid for that before this work had commenced on East B street.

Q. Before you commenced furnishing any material for East B street?

A. Well, now, I do not know—I think we began furnishing material for East B street along the first part of July or the latter part of June, and I think about the 10th of July, along there somewhere, we got paid for the rock we furnished before, this twelve hundred yards. I was surprised to get the money and discounted it, if I recall, some.

I do not recall what amounts we were paid. There were no sureties on Fourth Plain for the improvement, so far as I know. I do not think so. Mr. Rector was going to pay us for the first rock we furnished cash. I could not tell for sure whether they were working on East B street when we got our money that we applied on the Fourth Plain debt.

Q. Hadn't they been working there for three or four months?

A. They might have been grading and putting down sidewalks and things of that kind.

The first crushed rock furnished on B street, I

think was on July 1st. It might have been the latter part of June.

The bill of particulars which we furnished to you shows that the first rock furnished that went on East B street was furnished June 25th.

I have not our books here for the purpose of showing these dates.

Q. Then Rector & Daly were working on this street at the time you received the payment in July that you say was for the rock furnished on Fourth Plain. That is right, is it not?

A. Oh, no. We got only \$662.50 for the crushed rock we furnished on East B street. I could not tell without looking it up how much money we received altogether from Rector and Daly during that time. I know that Daly settled up with us in full somewhere about the first of July.

Q. Now, look at that bill of particulars again. That shows, doesn't it, that you received payment during the time Rector & Daly were working on this contract a total of \$9,812.15; \$2,500.00 ought to be taken off of that on a dishonored check; that would leave \$7,312.15 that you received during the time that Rector & Daly was working on this contract at the time you furnished rock?

A. I guess that is right, but we were not to get any pay for rock on East B street until he got his money.

Q. That's all right. You received that amount of money during the time you were furnishing this rock?

A. That statement (indicating paper) looks as though we received that amount of money. He owed it to us on sand and gravel and other rock, but not on East B street.

I did not know that he was getting money from East B street all of this time. We applied all of the money that we received from him during all of this time on this other indebtedness that he owed us for; it was due. After the application of those payments, Rector and Daly still owed us something on the other indebtedness; somewhere between \$500 and \$600 for sand and gravel.

Q. Well, that was furnished prior to this time. As shown by this bill of particulars, as sworn to by yourself, all of the material and all of the liability which Rector & Daly owed you was entirely wiped off by the application of payments you received during this time excepting for crushed rock?

A. Yes, sir.

Q. You did that when you found that Rector & Daly had gone into bankruptcy, didn't you?

A. No, sir; it was not then that we knew that they had gone into bankruptcy.

Q. You knew that Messrs. Sparks and Blurock were responsible men, looked them up and found that they could pay?

A. Yes, sir.

Q. And so, when you found that out, and found that Rector and Daly had no financial responsibility, then you proceeded to take all of the money you received during this time and wiped off all of the

unsecured indebtedness and came back on Sparks and Blurock because they were responsible?

A. No, sir.

Q. Was not that the understanding with Rector that you would do that?

A. No, sir. Never had any understanding with Rector about anything of that kind. The only understanding I had with Rector was that he was to pay me cash for all sand and gravel I delivered there, and was to pay cash for the rock we delivered on Fourth Plain, and he got behind in his payments, and we were drumming him up for payments, and all at once he got a payment for a lot of work that he did on Fourth Plain, got quite a little money all at once, and he came in and paid us all up, because he got that money from Fourth Plain; that is my understanding.

Mr. Rector on the start paid us for the sand and gravel when we furnished it, but then he got negligent and we had to carry him along.

Q. And during the time that he was working on East B street, at no time did he pay you for sand and gravel?

A. When he was working on East B street?

Q. Yes.

A. I know that he owes us for some yet that was delivered on B street.

During the time that we were furnishing crushed rock for East B street, from the time we first started, during all of that time when we were furnishing sand and gravel, they at no time paid us for sand

and gravel promptly upon delivery, and the only payments were checks given to us from time to time in large amounts.

Q. During this time, notwithstanding the fact as you said that you had an agreement with him that he was to pay you cash when you sold him sand and gravel, during all of that time he never did pay you cash when you delivered a load or a barge of sand, isn't that true?

A. I said on the start that he paid us cash, but during the time that he was working on B street, I said I did not know when he started on East B street.

I and my counsel have stated here that I had an understanding that we were not going to simply hold these sureties on East B street, but that I had to have cash for our sand and gravel, and that the money we were receiving from time to time was to pay for the sand and gravel.

Q. Now, I want you to tell whether or not during this time you received any pay for your sand and gravel?

A. During what time?

Q. During the time you were furnishing crushed rock for East B street?

A. We might have not received any money for sand and gravel then, but I think we did. I think that along about the 15th of July, we were furnishing crushed rock then for East B street, and that he paid me quite a little money then for sand and gravel and some for crushed rock, too.

He did not pay right on the date it was delivered; along about that time we could not get him to do it. Whenever he paid us in a large check, we applied it on what he owed us, and what he agreed to pay us on first, and left the crushed rock to be paid for when he got his pay, which I did not suppose he would get until it was completed. I didn't know that he was getting paid every few weeks. I told him we would wait until the job was finished. He did not tell me at the time I had this talk with him about his sureties on that street, that he would get his pay, based upon the engineer's estimates every two or three weeks. According to the bill of particulars, on July 5th we furnished 973 yards of crushed rock, coming to \$1,216.25. We have never been paid for that. We got this check for \$1,216.25 and the money out of it.

This check—I recall this check. We got one check, and I guess that is the one, \$1,216.00, and it says on it, "for crushed rock." We were not expecting to get any money for crushed rock, and he owed us for sand and gravel, and when I saw the check, I told him that that should not be for the crushed rock; that he still owed us for about three thousand dollars' worth of sand and gravel, and that he must pay for his sand and gravel, and so I called Mr. Rector up by 'phone and I told him we had got a check and that it had marked on it for crushed rock, and I says, "we are not expecting any money on the rock, and we want our sand and gravel paid for first," and Mr. Rector said that it didn't make

any difference; that we could apply that on the sand and gravel; that that was just a mark that he put on there.

Q. This was given to you as payment for crushed rock which went on East B street, wasn't it?

A. —and I told Mr. Rector—(interrupted).

MR. GILTNER: WAIT until he answers.

MR. MILLER: Complete your answer.

A. Well, I told Mr. Rector that I want him to pay for my sand and gravel first; that I had no security for it.

Q. That is the idea exactly.

A. And that this check had marked on it, "for crushed rock," and that I did not want that; that I wanted him to pay me for the sand and gravel, and he said, "that is a memorandum that the bookkeeper had put on there, and you can apply that on payment for the sand and gravel," and I told my bookkeeper to do it.

Q. Now, you have stated exactly the correct proposition; you knew you had received this check for crushed rock, and you knew that Sparks and Blurock were sureties on that and were good, so you wanted to apply that on the unsecured account and that under that arrangement with Rector you could do that?

A. I supposed Rector and Daly were good for it then, too, but I did not know whether he had got any money on East B street or not.

Q. What difference did it make to you whether

it came off from East B street, or not, if it was for crushed rock? You notice on the corner of this check it says "nine hundred and seventy-three yards of crushed rock," you notice that?

A. Yes, sir.

Q. It says "for crushed rock." It went on East B street, you will admit that?

A. Yes.

Q. That was for nine hundred and seventy-three yards of crushed rock you stated in your bill of particulars that went on East B street?

A. I do not know as I said it went on East B street.

Q. Why did you swear to this bill of particulars?

A. I knew at the time probably that it went on East B street, but I am not sure now that it went on East B street.

Q. That is what you are suing us for, \$1,216.00 for these particular barges of rock, is it not?

A. Yes, sir.

Q. What particular sand and gravel did he owe you for at this time?

A. I do not know what particular sand and gravel but he owed us about three thousand dollars, I know; I had the man look it up, and he owed us a whole lot, about three thousand dollars that he was behind on that we couldn't get our pay out of him for.

Q. How much did he owe at that time for crushed rock?

A. I do not know; I think he owed us considerable for crushed rock, too, but we were not to demand payment for that, because we did not suppose that he was going to pay for it until he got his money.

Q. And you did not propose to accept any payment off of that street until all else was paid for?

A. Certainly, we would have accepted payment off of that street—(interrupted).

Q. But not until everything else was paid for?

A. Oh, yes; we would have accepted money off of that street, too, if we could have got it, but this agreement with Mr. Rector was that he was to pay us for sand and gravel first.

Q. That agreement with Mr. Rector was that all money should be applied on the sand and gravel account first because you could look to the bond on East B street. Is not that true, as a matter of fact?

A. No, sir; that is not true.

I have not told a dozen people so within the last three or four days. I don't think I was ever in your office. My son has been there two or three times. There is a check for \$1,000 dated October 10th; that is when it was made out.

Q. Do you know the circumstances under which that check was issued?

A. Why, I suppose for money that he owed us.

We were not furnishing him sand and gravel at that time, but he still owed us for sand and gravel. Maybe we were furnishing him crushed rock on

October 10th. I do not know positively.

Q. I want to recall something to your mind, Mr. Hackett. Is it not true that you had a barge of rock ready for delivery over at Vancouver, or ready to be taken to Vancouver, and you told Mr. Rector you would not deliver that barge of rock unless he gave you a thousand dollars?

A. I never told him any such thing, and I do not remember of any such case.

Q. Don't you know that you had a barge of rock that you would not deliver until you got a thousand dollars?

A. No, sir.

Q. And that this was given to you before you would—this thousand dollars was given to you (indicating check) before you would deliver that barge of rock?

A. No, sir; I would have delivered the rock whether he would have given me the check or not, and I was willing to furnish it until he got his money to pay me. It might have been for a load of sand and gravel.

I am not sure whether we were furnishing sand and gravel at this time. I have no books here showing whether we were furnishing sand and gravel at that time. I have never refused at any time to furnish him crushed rock or demanded my pay before he got it.

MR. SEWALL: Here it is on the second statement (indicating).

MR. GILTNER: We are willing to have that in-

troduced in evidence; it shows the dates and everything.

MR. MILLER: I am not bound by the statement; I am asking him as a matter of fact.

On July 10th a check was issued for \$649.25 and we gave credit for that.

Q. How did you come to do that? Because at that time he owed you for sand and gravel, didn't he?

The date of this check is July 10th; it was paid July 11th.

A. We received some payment on the rock.

Q. I am now referring to the check for \$1,216.00, to which I called your attention awhile ago. You say that on August 11th, you discovered that he was paying you a check for crushed rock, and you told him you wanted to apply it on the sand account.

A. I told him that I wanted him to apply this check on the sand account; that he owed us for sand, but that the check was marked for crushed rock, and it seems to me that the next checks that he had marked rock he didn't owe us anything for sand at that time, so we credited rock.

Q. Here is a check for \$649.25—\$662.50 is what you gave us credit for. Here is one dated July 11th, which says on its face, "for crushed rock," about a month before this other one that you say he was owing you for an old account on sand and gravel.

A. I think that along in the fore part of July

he settled up with us for all the sand and gravel, and then along about the time when this came in, I do not think that he owed us anything for sand and gravel about that time, the 10th of July, and we applied it on the rock that he owed us on, and then later on, why, he got some more sand and gravel from us, and then I wanted my sand and gravel paid for first, as he agreed to pay me cash for sand and gravel, and then when he sent a check to pay for rock I applied it on the sand and gravel.

Q. Can you find on that bill of particulars where he paid you for sand and gravel during that time?

A. This is just a statement of the amounts that he owed us.

Q. Yes. Is there anything there showing that he paid you for sand and gravel in July or prior to the issuance of this check for \$662.50?

A. It does not show on that particular sheet, sand and gravel, and I do not know why that should be for sand and gravel.

Q. This is just the cash payments that you received?

A. This is a statement of sand and gravel (indicating), and this is a statement of cash payments for sand and gravel (indicating).

Q. Where are those payments for sand and gravel, showing that you were paid up in full during this time when you say that this check came in?

A. I do not know as I can tell by this, but I know that I recollect that Mr. Rector—(interrupted).

THE COURT: If the bill of particulars is there, that is a matter that speaks for for itself.

THE WITNESS: I am not a bookkeeper myself, and I cannot explain all of this.

Defendant here offers in evidence defendants' Exhibits 1, 2 and 3, and the same are received without objection.

Q. I call your attention to another check, July 17, 1911, for \$859.90. Did you receive that?

A. (Examining check). I guess I did. It is not marked "crushed rock," though.

Q. It is just marked "on account"?

A. Yes, sir.

MR. MILLER: I will offer it in evidence.

MR. GILTNER: I object to its introduction in evidence unless he shows what it was for.

Q. You received that during the time you were furnishing this crushed rock to Rector & Daly, did you not? You received it July 17th or 18th, did you not, 1911?

A. I think we furnished him crushed rock at the same time.

This check is offered and received in evidence without objection and marked defendant's Exhibit 4.

Defendant offers in evidence defendant's Exhibit 5, and the same is received in evidence without objection, and the witness testifies that this check is not on the bill of particulars.

Q. I show you a check for three thousand dollars; did you receive that?

A. Yes.

Q. That is dated September 6th?

A. Some of these checks were dated ahead.

Q. They were dated ahead and were not paid until he could get an estimate on East B street?

A. I do not know that.

Q. They were dated ahead?

A. Yes; and he asked us to hold them until that time, but he did not say anything about East B street to me.

Q. You knew that was where it would come from?

A. No, sir.

Q. It is dated September 6th, and paid September 7th, for \$3,000. We will offer that in evidence.

(No objections).

THE COURT: It may be admitted.

Whereupon said check is admitted in evidence and marked defendants' Exhibit No. 6.

Q. I show you another check for \$501.64, June 23, 1911. You received that, didn't you?

A. Yes. That is not for crushed rock, because that was before we delivered anything to East B street at all.

MR. MILLER: I will offer that in evidence.

Said check was received in evidence without objection, and marked defendants' Exhibit 7.

Witness testifies that the plaintiff received money for all of the checks offered in evidence and received checks at the time they bear date.

RE-DIRECT EXAMINATION.

Q. When Mr. Miller showed you the check dated October 10th for \$1,000.00, he asked you if you had not demanded that on a barge of rock?

A. Yes, sir; he asked me that.

Q. What was the fact about that?

A. Well, I do not know anything about that.

Q. When did you cease to furnish rock?

A. Well, on—(interrupted).

Q. If you know?

A. Well, I could not tell exactly; I did not furnish any rock to Rector & Daly after they told us they had abandoned the street.

Q. Was the last rock furnished on September 27th, showing you this bill of particulars (indicating)?

A. Yes; according to this statement.

RE-CROSS EXAMINATION.

Q. I just want to ask you this question—you may not know about it. You say that you did not furnish them any rock after they threw up the street?

A. Yes, sir.

Q. That was about the 20th of October when they quit?

A. At what time?

Q. The 20th of October?

A. I do not remember exactly when they quit; I know they notified us, and then we sent a notice, and that notice will tell the date that they quit.

Q. That notice is dated October 17th, is it not?

A. I do not know; I have not seen it.

Q. Well, I have a copy of it here. I assume that is the date?

A. Yes.

Q. Is it not true, about this barge I was asking you about, that it was brought up to the dock and that it remained there several days, and that the charge that was made against it was made when it was shipped and not when it was unloaded—the time you received the \$1,000.00 was at the time it was unloaded, but on the barge and had been there for several days?

A. I do not recall any barge being there for several days.

RE-DIRECT EXAMINATION.

The check for \$3000.00, dated September 6th, 1911, was paid on account of sand and gravel.

Q. Did he pay you \$3,000.00 at that time for sand and gravel?

A. I guess he did.

The check for \$501.64, dated June 23, 1911, was paid on crushed rock that was furnished before we started on East B street. He owed us that before.

Q. I hold in my hand a check dated July 5, 1911, for \$1,017.49; I will ask you what that check was given for, in payment for what?

A. This is July 5th (indicating)?

Q. Yes; that was paid on crushed rock or on sand and gravel?

A. It is marked for crushed rock; I think that check was paid for crushed rock that was furnished

for Fourth Plain, because I do not think there had been any rock delivered on B street then.

The check for \$859.90, dated July 17, 1911, was paid upon sand and gravel; so was check dated October 10, 1911.

RE-CROSS EXAMINATION.

Q. Now, you say this was paid on this account and that account; have you got any books here showing when and where you made the application of those payments?

A. I have no books here; no.

Q. And you say now you applied it on the sand and gravel account, because that is the way you wanted to apply it; that is right?

A. We applied it on the sand and gravel account because Rector said he would pay us for sand and gravel, and because we agreed to wait for him upon the rock until he got his money, and Rector & Daly did not pay us anything else but sand and gravel and crushed rock.

Q. Yes, and crushed rock, and you applied it all on the sand and gravel?

A. There was some that we did not apply on sand and gravel.

Q. You did not furnish any sand and gravel for East B street?

A. Yes, we did; quite a lot of sand and gravel for East B street, but as he agreed to pay us cash for sand and gravel, we did not put in any claim for sand and gravel that went on East B street. We furnished him sand and gravel that went on

East B street for sidewalks and curbs that we did not get our pay for, either.

Q. Did you sell to Wentworth?

A. No, sir; Rector and Daly had some that went other places.

Q. You do not know how much went on there?

A. I know that all of the sand and gravel that Rector used on East B street he got from the Columbia Digger Company.

Q. But you do not know how much he used, of your own knowledge?

A. Yes, I do; I do not know as I can tell the exact figures, but it must have been a number of thousand yards—it was over a thousand yards, anyhow, and I do not know but it was more; I could not tell how much, but I know all of the sand and gravel Rector built his sidewalks and curbs on East B street with was sand and gravel bought from us.

Q. But that sidewalk was built along in April and May?

A. Well, I could not tell, but the sidewalks were built before the street was.

Q. Before you furnished any crushed rock at all?

A. Some of it was; I do not know whether all of it was or not.

RE-DIRECT EXAMINATION.

We furnished the sand and gravel that went into the sidewalks and curbing on East B street that Rector and Daly put there. I should judge we furnished between \$2,000.00 and \$3,000.00 worth;

about \$2,500.00 worth, I should judge. We have not been paid for all that sand and gravel. I do not know to a dollar how much is due and owing us. I could not tell how much was owing us for the sand and gravel that went on the improvement of East B street. The balance still due us for the sand and gravel that we furnished these people is between \$500.00 and \$600.00.

RE-CROSS EXAMINATION.

Q. When you commenced furnishing sand and gravel, so far as this action is concerned—there was a balance due June 28th of \$615.10; is that right?

A. I guess so.

Q. You have been paid for that, have you not? This statement shows a balance due on June 28th of \$615.10. Now, you have been paid for that?

A. I do not know; we have been paid for sand and gravel—(interrupted)

Q. After that sand and gravel was paid for, there was still \$662.50 taken off the rock account?

A. Up until June, yes, sir; up to that time.

MR. GILTNER: That was credited on the rock account?

MR. MILLER: Yes.

Q. After you settled your sand and gravel account in full, then you credited one check on the crushed rock account?

A. Yes, sir.

Q. So, you have been paid in full for your sand and gravel?

A. Yes, paid in full up until somewhere, along,

I think—I think we were paid in full by Rector & Daly for everything that they owed us up until June 31st.

Q. And then the balance of that is what is in this account?

A. The balance is what he got from us since then.

Q. And there was none of that that went on East B street?

A. Of the sand and gravel?

Q. Yes.

A. I do not know.

Q. Because the sidewalks were built long before that?

A. They might have been.

RE-DIRECT EXAMINATION.

Q. It is not the sand and gravel that goes in there for the street itself?

A. No, sir; there might have been some of what we call “muck” sand; I do not know where that went to.

MR. GILTNER: I desire to offer in evidence at this time a certified copy of the notice to the City Clerk of the City of Vancouver, Washington, already referred to in the evidence.

MR. MILLER: I wish to make a formal objection. The point was argued in the demurrer, and it was overruled after being argued, and I do not know whether it has much merit or not, but it is worthy of consideration. The provisions of the statute governing actions brought upon liens re-

quires a case to be brought, to be commenced, within eight months, and, reasoning by analogy, this being in the nature of an action to recover for materials furnished, they should have commenced within eight months after the materials were furnished and after the notice was filed with the city clerk. It is incompetent and immaterial.

Objection overruled. Exception allowed.

WHEREUPON, Said document is admitted in evidence, and marked "Plaintiff's Exhibit A."

Plaintiff offers in evidence the certified copy of the original ordinance, which was admitted in evidence, and marked "Plaintiff's Exhibit B."

John J. Caspary, called as a witness, in behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

On or about and prior to June 25, 1911, I was bookkeeper for the plaintiff, and am bookkeeper for the plaintiff. My duties are such duties as come under the general work of an ordinary bookkeeper of any establishment; that is, to keep track of the sales, receipts and disbursements, and to make proper charges, to keep track of the expense accounts; in other words, to keep the details of the business as closely as possible. To credit receipts and payments allowed; they pass through my hands.

Q. I will ask you if you were familiar with the accounts of Rector & Daly with the Columbia Digger Company? That is, up to about the 25th day of June, 1911, for sand and gravel and rock

furnished them on account of the Fourth Plains contract, and other contracts, especially the B street contract, in the City of Vancouver, Washington.

A. A bookkeeper, in his ordinary course of business, has got so many of those little things to look after that it is pretty hard, after two years to say how it stood exactly. I can remember approximately how it stood at that time.

Witness shown account on bill head of plaintiff and asked what the figures thereon are and who made them, and in answering testified as follows:

Page one, Exhibit A, is a statement made by myself, from the books of accounts of Rector & Daly, showing the number of yards of rock furnished on B street, Vancouver, Washington, and the credits given thereon. This is a correct statement of the standing of rock, and payments made on rock deliveries, particularly at the present time, and at that date also. I know what the balance of \$615.10 on June 28th represents. It consisted of \$12.50 for crushed rock, and the balance for sand and gravel.

MR. MILLER: If the witness knows nothing about that except as it appears from the books, then I object, because the books would be the only competent evidence.

MR. GILTNER: We will find out whether he knows.

THE COURT: He may only answer if he knows.

Q. Do you know what that was for?

A. What was the balance itself for?

Q. Yes.

A. That balance consisted of \$12.50 for crushed rock, and the balance for sand and gravel.

Q. What for? Furnished where?

A. That crushed rock was furnished prior to any contract, or prior to any delivery on B street, and it was bought by Rector & Daly for Fourth Plains. The sand and gravel, why they bought just for their ordinary purposes or carrying on, or acting as dealers in sand and gravel. The item dated June 29, 1911, \$244.80, represents a charge for 408 yards of sand furnished to Rector & Daly. The next item dated July 8th, \$321.60, represents a charge for 402 yards of gravel. The next item, July 8th, 352 yards of gravel, amounting to \$281.60. July 9th represents a charge for 337 yards of gravel, amounting to \$202.20. July 9th represents a charge of 350 yards of sand and 410 yards of gravel, amounting to \$538.00. July 11th represents a charge for freight paid, transferring asphalt from Portland to Vancouver. The item is \$379.65. July 11th represents a charge of 422 yards of sand, amounting to \$211.00. July 17th represents a charge of 627 yards of gravel, amounting to \$501.60. July 18th represents a charge for 1105 yards of sand, amounting to \$552.50. July 30th represents a charge for 355 yards of gravel, amounting to \$284.00. August 10th represents a charge for 353 yards of gravel, amounting to

\$282.40. August 11th represents a charge for 379 yards of sand, amounting to \$189.50. August 16th represents a charge for 341 yards of gravel, amounting to \$272.80. August 17 represents a charge for 428 yards of sand, amounting to \$214. August 19th represents a charge for 347 yards of gravel, amounting to \$277.60. August 27th represents a charge for 337 yards of gravel, amounting to \$269.60. August 29th represents a charge for 372 yards of sand, amounting to \$186.00. August 31st represents a charge for 428 yards of sand and 323 yards of gravel, amounting to \$472.40. September 6th represents a charge for 403 yards of gravel, amounting to \$322.40. September 10th represents a charge for 299 yards of gravel, amounting to \$299.00. September 12th is a book charge of a protested check; the check was never paid. It was for \$2,500.00, and a protest charge of \$3.00, making a total charge of \$2,503.00. Plaintiff paid the protest charges. I did not receive the money on the check for \$2,500; it was protested. Next item, September 20th, is 313 yards of sand, amounting to \$250.40. September 21st represents a charge for 200 yards of gravel, amounting to \$200.00. September 27th represents a charge for 331 yards of gravel, amounting to \$264.80. October 2nd represents a charge for 360 yards of sand, amounting to \$180.00.

These items were for the months that occurred in the year 1911. These total charges, including the balances, amount to \$10,375.95. Deducting

\$2,503.00 leaves a difference of \$7,812.95. That represents the total charges for sand and gravel and freight made against Rector & Daly between June 28, 1911, up to and including October 28, 1911.

Q. Look at the items on Exhibit A, which has been marked for identification, and give the dates, and what those items are and what they are for.

Counsel for the defendants objected to the witness using the exhibit mentioned for the reason that the original books were not offered in evidence and the witness was using a purported copy of the bill of particulars furnished to the defendants, and the objection was overruled for the present.

A. Exhibit A represents charges made all for crushed rock furnished to Rector & Daly for the improvement of B street, at Vancouver, Washington, under the following dates: June 25th, 530 yards of crushed rock, \$662.50; July 5th, 573 yards of crushed rock, \$1,216.25. The next is August 1st, 478.7 yards of crushed rock, amounting to \$598.38; August 10th, 401 yards of crushed rock, amounting to \$501.25; August 22nd, 380 yards of crushed rock, amounting to \$475.00; August 23d, 445.6 yards of crushed rock, amounting to \$557.00; August 29th, 336 yards of crushed rock, amounting to \$420.00; September 2d, 384 yards of crushed rock, amounting to \$480.00; September 4th, 370 yards of crushed rock, \$462.50; September 24th, 401.4 yards of crushed rock, amounting to \$501.75; September 26th, 402 yards of crushed rock, amounting to \$502.50;

September 27th, 380.2 yards of crushed rock, \$475.-25; total, 5,481.9 yards, amounting to \$6,852.38. Under date of June 29th, 1911, we credit that account with discount, \$13.25, and by check, \$649.25.

That was a total credit of \$662.50, under date of June 29th, leaving a balance of \$61,189.88. Rector & Daly gave us on June 29 a check for \$649.25 in payment of a barge of rock that went on B street. There was a discount of 2 per cent, \$13.25, making the net amount of the check \$649.25. Total credit we give on B street, \$662.50.

Q. What account was that?

A. It was a check that we received July 15th, amounting to \$859.90. Up to July 1st, or June 30th, according to the figures shown on Exhibit B; that takes up the balance of \$615.10, and the first charge following thereafter of \$244.80, those two items amounting to \$859.90. Those two items are the first two items on Exhibit B. The check, defendants' Exhibit 4, paid the Rector & Daly account up in full to June 30th or July 1st, whichever way you want to consider it. \$12.50 for rock and the balance on sand and gravel, but I would not say positively that the rock went on Fourth Plains; the rock was bought for that purpose.

THE COURT: Was this payment made by the books?

A. Yes.

MR. MILLER: Then, the books would be the best evidence.

MR. GILTNER: I will produce the books if he insists upon it.

MR. MILLER: I am not insisting upon it.

THE WITNESS: This check was sent to us to cover a statement sent to Rector & Daly showing that balance. This statement was made up from the books. Exhibit C on the bill head of the Columbia Digger Company is also a statement made up by myself, showing the payments made by Rector & Daly, and also their credits allowed them. I made those figures; I took them from the books of the company; they are a correct representation of such books.

Q. I wish you would, item by item, state what the payments were, when they were made, and what they were for, as shown by the books, as the court has stated?

A. Check dated July 12th, \$300, was a check Rector & Daly to cover freight paid by the Columbia Digger Company on asphalt, which asphalt was delivered at Portland. That was the freight charge, not made by ourselves, but by the transportation company for bringing the asphalt to Portland, and we paid the freight to accommodate Rector & Daly, and they sent us their check in return. The next check is a credit on July 15th, \$859.90. As I said before, that item balances their account up to June 30th. The next item is under date of August 3d, amounting to \$1,216.25.

Q. Explain that; it has marked on it, "Crushed

Rock." What do you know about that check, and what was done?

A. When I noticed that check, I saw that it was marked "Crushed Rock," so I called Captain Hackett's attention to it, and I told him—(interrupted)

MR. MILLER: We object to that.

Q. You cannot tell that, unless Rector & Daly were present and knew about it, but afterwards, did you ever have Rector & Daly ratify what you are saying now? Have you ever talked any with Rector & Daly?

A. No, sir.

Q. Have you ever had any conversation with Rector & Daly, or anyone, regarding that check since, as to the reason as to why it was not put onto crushed rock?

A. I have since, yes, sir.

Q. Then, you can testify to it .

THE COURT: A conversation with Rector & Daly since?

A. I have spoken with Mr. Rector about it.

MR. MILLER: Recently, the last few days?

A. No, sir; at that time; Mr. Rector at that time used to come into the office every once in a while.

MR. GILTNER: I think that is competent.

Q. State, and explain that check and the circumstances of the check, and the item marked "Crushed Rock" on it, and everything about it, to the judge.

A. When I noticed that the check was marked

“Crushed Rock”, I called Mr. Hackett’s attention to it, and also the fact that Rector & Daly at that time owed us for sand and gravel delivered during the month of June, which amounted to something like \$2,800, and that this sand and gravel had not yet been paid for, and if we were to accept this check which was marked “Crushed Rock,” we would be exacting payment for something which we agreed to wait for, and at the same time give an extension to Rector & Daly of time on their sand and gravel, which they promised to pay cash for and on which they were \$2,800 behind. I did not hear the telephone conversation or communication which Captain Hackett had, but the check was later on turned back to me with instructions from Captain Hackett to credit it to sand and gravel. Later on I understood from Mr. Rector that that was the arrangement made with him, and that it was satisfactory to him.

The next item represents a rebate of \$40.80. I do not recall just now what that is for. It is a credit to Rector & Daly; it is an allowance that we made to them for some overcharge or something. I could not say positively what it is for. The next item is a credit on August 28th, a check amounting to \$3,000. It is defendants’ Exhibit 6. It is quite evident that it was a post-dated check. I have the credit under date of August 28th, the date we received it; it was post-dated; we received it on August 28th, and the receipt is dated September 26th.

Q. State what it was for?

A. Well, there was no application of the check made, that is, on the check itself, and, according to the agreement with Rector & Daly, we applied it to the credit of sand and gravel, in view of the fact that there was still owing us, even at that time, quite an amount on sand and gravel. As a matter of fact, Rector & Daly have not yet paid their sand and gravel in full. They always did owe us a big balance.

Q. The next item?

A. The next item, pencilled across, refers to a credit for \$2,500, a check also post-dated, a check which has never been paid.

MR. MILLER: That \$2,500 may as well be marked off; it cuts no figure.

THE WITNESS: That may be true, but in making this statement, when we received the check, we had to give credit for it. When we put it through the bank, the bank had to give us credit for it, and for our record, we had to put it on the statement. The next item is a discount of \$5.00 which we allowed when Rector & Daly gave us a check for \$250.00 under date of September 27th. The next item is a check for \$176.40, on which we gave Rector & Daly a credit of \$3.60 for discount. The next item is a check for \$1,000 on the old sand and gravel account. The check dated October 10, 1911, defendants' Exhibit No. 2, is this check for \$1,000. The check is dated October 10th, for \$1,000. I received it and credited it to the sand and gravel account, because there were no further instruc-

tions given to me, and I credited it according to the agreement, and because Rector & Daly still owed us a heavy balance on sand and gravel.

The next item is a credit of \$450.00. By check \$450.00; but that check is not a Rector & Daly check. That check was given to the Columbia Digger Company by the Warren Construction Company, to protect an order on them by Rector & Daly. It seems that Rector & Daly had some money coming from them, and we wanted to get money from them on their sand and gravel account, and they gave us an order on the Warren Construction Company, and this check was the payment of the order, and then there was a small balance of ten dollars and something, which Mr. Rector deducted on one or two occasions, in view of the fact that when we took the asphalt over, we lost two barrels of asphalt, and they practically offset each other, and I closed it up. Those total credits amount to \$9,812.16.

The total charges for sand and gravel and freight, including that protested check, amount to \$10,315.95. Those total charges, by the way, are marked Exhibit B, and those total credits I have just read off, and which are marked as Exhibit C, including the protested check, amount to \$9,812.15. The difference I think you will find is \$503.80. That represents the amount Rector & Daly still owe the plaintiff for sand and gravel; they have not paid that. They have not paid what they owe on B street for crushed rock that was furnished them.

Q. I hold here in my hand defendants' Exhibit

5, a check dated Vancouver, Washington, July 5, 1911, for \$1,017.49, and on the left-hand corner of it is marked "Yards of rock." I wish you would explain to the judge what that check was given for?

A. That is a post-dated check. It was received in the latter part of June, I think June 27th or 28th, and it is in payment of two barges of rock furnished for Fourth Plains, and from that he has taken a discount, I forget just the amount. That does not show on here, because—these exhibits were made at the request of the attorneys for the defense, and only call for statements of the business transacted between the time of work done on B street. Now, this rock was furnished before B street rock, and the check was received before our records at least show any transactions on B street, and for that reason this check is not shown on these credits, but the check itself was received by the Columbia Digger Company, and applied to the credit of crushed rock furnished for Fourth Plains. I hand you now defendants' exhibit 7, a check dated Vancouver, Washington, June 23, 1911, for \$501.64, and on the left-hand corner in ink is "crushed rock." I wish you would state to the court what that was for?

A. That check was the same proposition as the one just read off.

THE COURT: What was the amount of that?

A. \$501.64. That was for rock furnished for Fourth Plains, and this check is in payment of that

rock, and they got due credit for it on the books of the Columbia Digger Company.

Q. I will ask you now if everything supplied by the Columbia Digger Company to Rector & Daly were paid in full up to July 1, 1911?

A. Rector & Daly had paid—these accounts are all since July 1st. This check which we received under date of July 15th, balanced Rector & Daly's account in full up to July 1st.

CROSS EXAMINATION.

So, everything that Rector & Daly owed us was satisfied up to July 1st. We were furnishing them some rock in June. I don't remember the exact date now we commenced in June, but I think about June 15th. We did not commence furnishing them rock for B street about June 15th; I think under date of June 29th we furnished them a barge of rock on B street. That is the barge for which we admit payment. The barge was placed on June 25th, and the payment was made on June 29th. The first check we received for crushed rock on B street was July 10th. That is the first check we received applying on B street.

This check is dated July 10th.

Q. But you got it on June 29th, did you?

A. Well, I would have to see from those statements, but I think that is right. Rector & Daly frequently gave us post-dated checks. By calling off the date of the check, I could not state positively that we received it on that date. We could not present it until they had money in the bank to take it

up. No bank will honor a check post-dated until the date of payment arrives.

Q. And you had to wait until they got the estimate on B street before they would take this up?

A. I do not know anything about the estimate on B street. My record will show whether this check was post-dated or not. I think it will show on there, because whenever we received a check that showed in our records that it was received on that date, regardless of when it was post-dated. Aside from my records, I remember that that check was post-dated. It was received toward the latter part of June 29th; I remember that independent of my records. I remember distinctly now, because I just happened to see those—. On June 29th Rector & Daly owed us \$615.10, balance on sand and gravel.

Q. Why did you not credit this check on sand and gravel on that particular date?

A. Well, while the sand and gravel was still on terms of cash, still the Columbia Digger Company had never been so exacting as to demand spot cash on everything, so long as the person paid the account on or about the 5th or 10th of the month. It was satisfactory—Rector & Daly at that time did not owe such a very great amount of money. They only owed about eight hundred and seventy dollars, I think—no; eight hundred and some forty dollars, on sand and gravel, and when that check came in marked "Rock" they did not object to receiving it on rock, because they expected Rector & Daly would

keep their rock and send the payment of the balance on sand and gravel in a few days, which they actually did.

We had an agreement that the sand and gravel would be paid first. When we received this check for \$662.50 we applied that on the rock account.

Q. But, at that time, there was more than the amount of this check due you on the sand account? That is true, is it not?

A. I want to make a distinction; there is a difference between "owing" and "due." You might owe a bill, and at the same time the bill is not due.

Q. All right; the sand and gravel account was both owing and due when it was furnished?

A. No, sir; the company has never taken the stand that the bill for sand and gravel becomes due the actual day it is delivered.

Q. When is it due?

A. Generally figure payment on or before the 10th, is the way ordinarily of figuring; that is the way we are transacting business, even at the present time.

Q. When you got this check of August 8th for \$1,216.00, marked "Yards of rock," you did not apply that on the rock account, but applied that on the same—on the sand account?

A. Yes; that is because they owed such a large amount, and it had already passed that certain time, certain date of ten—or tenth—(interrupted)

Q. It had not yet passed the 10th of August, had it?

A. No, sir; but that was due in July; they were owing \$2,800 for sand and gravel delivered in June which should have been paid in July. We received \$859.50—.90 (?), which paid their account up to June 30th. That \$2,800 they owed for sand and gravel delivered in July.

On July 15th we got a check for \$859.90, which squared up the June account. You are firing so many dates, I am getting mixed up. That check for \$859.50 was received about July 15th and paid their June account in full.

Q. Have you not already stated that on the 1st of July, on the 28th of June, 1911, they owed you a balance of \$615.10?

A. Well, there is another figure with that, and that is what was taken care of with that check for \$859.00.

Q. There is your statement (indicating). There was a balance of \$615.10 due on June 28th?

A. Yes, sir. That is all they owed us on June 28th.

Q. Those items were not included in this statement?

A. In which account?

Q. In this account that makes up this check for \$859?

A. They are on that statement.

Q. Where are they?

A. This balance of \$615.10, together with this charge of June 29th of \$244.80, amounts to \$859.90, which were paid by check received by us on July

15th for sand and gravel and rock account balance on July 1st.

Check for \$662.50 paid for the crushed rock up until July 1st, and the check of July 17, 1911, paid for all of the sand and gravel up to July 1st, so that Rector & Daly really owed nothing except what was bought or delivered to them after July 1st. Everything was squared up to that date, and all payments received after that time are for material furnished after that date. When we received this \$1,216.00 check, we applied that on the sand and gravel account. They owed us at that time about \$2,800.00 on sand and gravel, and owed us \$1,216.00 for crushed rock. At the time this second check was given, they owed us for two barges. That check corresponds exactly to the two barges of rock. They amounted to 973 yards, or \$1,216.00 in money. It probably was the intention of Rector & Daly in making that check to give it in payment for these two barges of rock. It corresponds in amount, too. We applied it to our sand and gravel account by instructions, and according to the agreement between Captain Hackett and Mr. Rector.

Q. And you did likewise with those other checks, one for three thousand dollars?

A. My understanding is that the company has a right to—(interrupted)

Q. That is a question of law for the Court to decide. That is what you did do; you applied all of them to the sand and gravel account, regardless of where they came from?

A. Yes, because there was no application made by the payer.

Q. The main reason was because you had security on B street, and not security on the other items?

A. Not as I know of.

I made up this statement that went to the City Council as to the amount due for crushed rock.

Q. How did you come to make this \$8,415 due for crushed rock?

A. Why, I omitted to give Rector & Daly or B street proper credit for the check for \$649.25. We made that correction; that is why we are now claiming less. Just a second; I will explain that.

Q. All right.

A. I had credited them this payment of \$649.25 and discount of \$13.25 to sand and gravel in error, when I drew up this statement. That overpaid Rector & Daly's sand and gravel account \$158.70. When we gave them credit for the difference there, that accounts for the \$503.00 which Rector & Daly still owe on the sand and gravel. You see, the \$662.50—from that, if you will deduct \$158.70, which is the credit they got by overpayment on sand and gravel, leaves a balance of \$503.80, and brings the amount we are claiming down to \$6,189.88.

Q. You have not yet explained how this came to be \$8,415.00.

A. May I have that (indicating paper) a moment, please?

Q. Yes. (Counsel hands paper to witness).

A. We probably—I am pretty sure it does include the rock furnished on Fourth Plains.

Q. But it is a notice to the city of the rock furnished on B street?

A. Yes, sir.

Q. And in that you are claiming that you furnished eight thousand dollars—(interrupted)

A. Well, I admit error in making the statement read that much; that included the rock furnished on Fourth Plains.

Q. I show you another paper (handing paper to witness). Did you make that out?

A. That is what I was explaining just now. That is \$158.70; I credited them \$662.50, sand and gravel, and if I did that it would overpay sand and gravel \$158.70, so I have not credited them with \$158.70 here. In going over the account, I found my mistake, and, therefore, gave you credit for the correct amount, \$662.50; the difference is \$503.80, which Rector & Daly still owe on sand and gravel.

Q. As a matter of fact, you did not credit them \$662.50 until after this suit?

A. In segregating it, and drawing off this statement, I credited them with sand and gravel instead of crushed rock.

Q. And it so appears on your books, \$662.50 credited to sand and gravel, on your books?

A. It was credited to the account of Rector & Daly and it was marked "rock," but in drawing off the statement, I credited sand and gravel to rock account.

Q. When you found out that you were getting a little too much money and it overpaid sand and gravel, you later on twisted it around, and now he gets credit for it?

A. That was done, all right, but not because we were getting too much money, because we would like very much to get the rest of the money. We are giving Rector & Daly and Sparks & Blurock credit when we think they are entitled to it.

Q. At the time this \$662.00 came in, you did not credit it on the rock account?

A. I posted it to the credit of Rector & Daly, the way they keep their accounts.

Q. That is exactly the truth about it; you credited all of these checks to the account of Rector & Daly, without especially applying them to any account?

A. No, sir; the checks marked rock, I marked rock in the ledger accounts.

Q. You did not bring the ledger with you?

A. No, sir.

I made this out on December 30th as the correct crushed rock account. I admit that I made an error in not crediting you with the \$662.50, and in our claim we are now allowing this \$662.50 on B street. In this account we are giving you credit for \$158.70.

RE-DIRECT EXAMINATION.

Q. Did you make an error on the books, or in taking off the statement from the books?

A. Taking off the statement from the books.

Rector & Daly show these credits or checks, and they are marked whether they are to be applied on rock or not.

Q. Did you mark any rock?

A. Yes; that check for \$501 is marked rock, and the check for \$1,016 is marked rock, and the check for \$859.90 is marked rock, and the \$12.50 is marked rock, and the check for \$649.25 is marked rock.

Q. Why didn't you bring that book here to show that?

A. We were not required to and the attorney did not say it was necessary.

Q. When you were taking that rock account, why did you not put that on this bill?

A. I admitted it was an oversight, an error on my part.

Q. You took that from the ledger marked rock, and posted—placed it on the same—on the sand and gravel account?

A. Yes; that is the error I made; yes, sir.

A. B. RECTOR, called as a witness on behalf of the PLAINTIFF, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I was a member of the firm of Rector & Daly, one of the defendants in this case. Our firm had business relations with plaintiff in regard to furnishing crushed rock on the B street improvement in Vancouver, Washington. They furnished us for that improvement about 5,440 yards, something like

that; it might have been 81 yards, I am not sure. We were to pay \$1.25 a cubic yard at the dock. We have never paid for that crushed rock. It went on the B street improvement, that amount of rock.

Q. You have a credit of six hundred and sixty-two dollars and fifty cents on that account. Do you know that?

A. Well, I do not know; I would have to refresh my recollection from a check or something of that kind with regard to that. I have no books.

Q. Do you know how much Rector & Daly owe them on the crushed rock furnished on B street?

A. Sixty-one hundred and eighty-nine dollars and something; it is so claimed by them.

I think the last crushed rock was delivered to us on B street sometime in September or October; the latter part of September or the first of October. I think it was about September 27th; that is my recollection. I would not be sure of it. I would not be sure of the exact date.

CROSS EXAMINATION.

Q. Did you pay them one thousand dollars for the last barge of rock that came?

A. Well, I am not sure in regard to that. I do not think I drew that check; I do not think that I ever saw that check, personally, myself. I can tell if I see the check.

Q. Is it not true that there was a barge of rock at the dock to unload which the company refused to unload until they got a thousand-dollar payment?

A. I do not remember that.

Q. And for him to go to the bank and get a thousand dollars and pay them?

A. My recollection of that transaction is that I called up Mr. Daly, and called Mr. Bouten, the president of the bank. I wanted some money. The Columbia Digger Company refused to deliver any more rock until we paid up our sand and gravel account. That is my recollection of it.

I remember testifying in a case at Vancouver where Sparks & Blurock sued the Vancouver Trust & Savings Bank.

Q. And in that case did you not testify as follows: "Can you tell from your books what became of the money?"

A. It was used for various purposes, paying the help and labor.

Q. Can you tell from your books where it went?

A. No, sir.

Q. Can't tell anything about, can you?

A. No, sir.

Q. Do you know if any of the portion of the bonds you received from East B street went to the Columbia Digger Company?

A. I think one thousand dollars went to the Columbia Digger Company.

Q. Credited on its account?

A. I think so.

Q. That is all they ever got out of the East B street improvement?

A. I think so.

Q. What do you base that on?

A. For the reason that we borrowed one thousand dollars to pay the Columbia Digger Company, the last we borrowed from the Vancouver Trust & Savings Bank; Mr. Daly borrowed that."

Q. That is true, is it not?

A. If I testified to it, it is.

Q. So this last one thousand dollars was borrowed at the bank to pay for a barge of rock, which they refused to unload until they got the one thousand dollars?

A. I cannot testify that they refused to unload it.

Q. Well, you could not go on with the improvement, and did you not tell Mr. Bouten that you could not go on with the improvement on that street unless you got a thousand dollars to pay for this barge of rock?

A. I told Mr. Bouten that we would not go on with the improvement of that street; that we would have to give up that street, and turn it over to the bondsmen, unless we could get more money than we were getting for our improvement. That is my recollection.

Q. Didn't you tell him that you had to have this thousand dollars?

A. Yes; I think I did.

Q. To pay for this barge of rock?

A. Well, I wouldn't say it was rock.

Q. You were not getting any sand and gravel at that time?

A. I think we were supplying Elwood Wilds.

Q. You did not need any sand and gravel to complete East B street at that time?

A. When was that?

Q. October 10th.

A. I think that at the time the sidewalks and curbs were all in.

Q. Here is some more of your testimony:

“Q. Any data that you have, or any books from which you can refresh your recollection to tell whether the Columbia Digger Company received anything less than one thousand dollars?

A. They received money for sand and gravel, but none for rock, with the exception of that thousand dollars.”

Q. That is what you testified to?

A. My testimony would be fresher in my mind at that time than it is at the present time.

Q. And if you so testified at that time, that is true?

A. I think it is.

Q. Don't you think you did so testify, Mr. Rector?

A. Well, if it is there on the records, I must have.

Q. Well, it is.

Q. For fear counsel may object to my asking this question—I will ask you this, Mr. Rector, if on the 10th day of October, 1911, you did not telephone to Mr. Daly in Vancouver, you being in Mr. Hackett's office, that is, the office of the plaintiff here, in Portland, Oregon—I do not know whether

he was in the office with you or not—if you did not telephone to Mr. Daly that the plaintiff would not unload this barge of rock which they had at the wharf, unless he would get a thousand dollars for it, and if Mr. Daly did not a little while later 'phone you that he had arranged for the thousand dollars?

A. Well, I do not remember. I do not think it was. I think I brought this question up with Mr. Daly in Vancouver in the evening; that is my recollection.

Q. You will not say that you did not 'phone to Mr. Daly?

A. No, sir; I will not say that I did not; I might have.

Q. Now, you say that they have not been paid for the rock which you got on—(interrupted)

A. They claim not.

Q. I am not asking you what they claim.

A. I know Rector & Daly did not pay for it. I do not know whether the bondsmen paid for it or not, out of the money that was left from it.

Q. Did not Rector & Daly pay for the crushed rock that went on that street?

A. I do not think so.

Q. Did not Rector & Daly have an arrangement with the Vancouver Trust & Savings Bank to get the money that went to pay for this rock?

A. Our arrangement was with the bank that we would see—that we would sell all of our bonds to the bank on B street and Connecticut—

That is my signature to defendants' Exhibit 8.

Whereupon defendants offered in evidence Exhibit 8.

MR. GILTNER: I object to the introduction of this in evidence, because it states in here that they have entered into a contract—well, the Court can read it. It is not the contract. It is a notice to the city, but it speaks of a contract, and the contract is the best evidence, and therefore I object to it.

Q. There was no other contract between you and Mr. Bouten than this?

A. I think not; I do not believe that there was.

Q. This is all the written contract you had?

A. Yes, but we had verbal agreements back and forth.

MR. GILTNER: Any notes, or anything of that sort?

A. Yes; notes every time we went in there and got money.

MR. GILTNER: I object to it as not the best evidence.

THE COURT: Objection overruled. Exception allowed.

WHEREUPON said paper is admitted in evidence, and marked Defendants' Exhibit No. 8.

Q. You had an understanding with Mr. Bouten that you were to turn over the bonds you got off the improvement of B street to Mr. Bouten, and he would advance money to you from time to time, based upon the estimates on that street. That is right, is it not?

A. Well, we had an arrangement that all of our moneys went in there.

Q. I understand, but so far as B street was concerned?

A. Yes, they were to handle the bonds at eighty-seven cents.

They handled the bonds on B street, Connecticut avenue and on Fourth Plains; I am very sure of that; the same notice to the city on all of those streets. I do not know that Connecticut went to Mr. Wentworth. I might have so testified at the time of the trial of this case in Vancouver, but I have forgotten my testimony in regard to that. I do not think that they all went to Wentworth, but we did have that arrangement with Mr. Bouten and the Vancouver Trust & Savings Bank.

Q. And you were getting and did get estimates on this street every two or three weeks?

A. Well, Mr. Bouten got them.

Q. Did you know of your own knowledge that he got them?

A. I know that when we were overdrawn, or something like that, he would get Mr. Lotter to give him an estimate.

MR. GILTNER: Were you with him?

A. No, sir.

MR. GILTNER: Then I move to strike that out.

THE COURT: Motion granted.

Q. You drew money from time to time from Mr. Bouten, based upon the improvement of B street?

A. Our moneys was all in there. We put through the Vancouver Trust & Savings Bank from the first day of April over seventy thousand dollars; that was moneys that came from the pipe line, some of it, money that came from the sale of sand and gravel, from B street, and \$4,000 came from the grading of what is commonly known as the old race track, forty-five hundred; I think it all went through there. All of that went through during July, August and September. The last payment, I think, was made in July.

Q. Is it not true, Mr. Rector, that the only money you put into the Vancouver Trust & Savings Bank during July, August and September was a small amount which you received from Elwood Wilds, other than what came from B street?

A. I think that the records will show we put through that bank from Elwood Wilds and the Barber Asphalt Company something like ten thousand dollars.

Q. Now, you say that they have not been paid anything on crushed rock. You, or the bank for you, received a large sum of money from B street during the time that this work was going on, didn't you?

A. Yes, sir.

Q. Amounting to twenty-three or twenty-four thousand dollars?

A. Twenty-five thousand dollars, I think, approximately.

I do not remember giving a check for \$3,000.00.

If I drew the check I could identify it. (Witness here shown the check). Well, I signed that check; I must have given it; my signature is there; I do not remember. (Witness shown note dated September 7th for \$4,000.00). I signed that note.

Q. Now, that note, Mr. Rector, was given to the bank because there was no money in the bank to take up this three-thousand-dollar check. Is not that so?

A. Well, I do not recall.

Q. And this note was based upon a B street estimate?

A. Well, I could not say.

Q. You do not know?

A. No, sir; because our notes we gave back and forth—our notes were jerrymanded around there so we did not know—we did not have any separate B street fund.

At the time we gave the \$3,000.00 check we did not have money enough in the bank to cover it.

Q. And after it was marked "Rejected," do you remember going into the bank and giving this four-thousand-dollar note the next morning or the same evening?

A. It could not have been the same evening.

Q. The next evening?

A. No, sir; that check is dated September 6th, and sent to the Columbia Digger Company.

Q. It was marked "Rejected?"

A. But it could not have gotten back there on the 7th, for the simple reason that the Columbia

Digger Company could not get it until the 6th, and it went through the First National Bank.

Q. It did not go through the bank?

A. Yes.

Q. Didn't they reject it?

A. Well, the First National Bank of Portland, I think, rejected it, so that note might or might not have covered that check.

Q. Do you know what date it is marked paid?

A. I could not say that.

Q. It is marked paid September 7th?

MR. GILTNER: Yes, it is marked paid September 7th.

Q. You said it was turned down; what indicated that?

A. I say it is marked across the face "Insufficient funds," right there (indicating). We did not have sufficient money to take it up, or it would not have been turned down. I could not say whether we had any money there at all. If you have my bank book there I can tell you.

Q. And you gave this note for four thousand dollars, and that note was given against the B street improvement, or fund?

A. I do not know whether it was or not.

Q. Mr. Bouten would not trust you on anything else?

A. Well, we turned in money every day.

Q. But, every note you gave to Mr. Bouten during this time was given against the B street fund?

A. I do not know anything about that; I do not know what he applied on it.

Q. But you do know that at the time this four-thousand-dollar note was given, that is, the note signed by you, and given to the bank and the money advanced, based upon the B street estimates?

A. I cannot swear to that.

Q. You would not swear it is not so?

A. No, sir; I would not swear it is not so, and I cannot say it is so; we borrowed money there even to pay other indebtedness from Mr. Bouten that had been running against Rector & Daly for six or seven months prior to that time.

Q. Did you borrow any money at that time?

A. On that particular date?

Q. Yes.

A. I do not know—we borrowed five or six hundred dollars for a donkey engine and gave a note for it.

Q. When?

A. Along in September or the fore part of August; somewhere along there; I cannot say exactly. We borrowed money there for no particular purpose.

Q. Is it not true that Mr. Bouten and Mr. Evans absolutely refused to lend you any money except upon B street estimates?

A. If I remember right, I never talked with Mr. Evans regarding funds whatever; I done all my business with Mr. Bouten.

Q. At this time, this particular time, you were

not borrowing money to pay for something else, because there was none of your money in the bank at the time the four-thousand-dollar note was given?

A. There was not enough money to pay for that particular check, or the check would not have been turned down. It might have been to pay labor; we borrowed money to pay labor.

MR. GILTNER: Would you give notes for it?

A. We gave a note for everything we borrowed there, I think, or gave a check on Hartman & Thompson.

Q. Here is a check for \$1,126.00; what is the date of that?

A. (Examining check) August 8th.

Q. At the time that was given, that was given in payment for rock, wasn't it, that went on B street?

A. August 8th?

Q. Doesn't it say so down on the corner?

A. I cannot see that from where I stand. This is my writing. At the time I wrote my signature on there I did not write those figures in the left-hand corner; our bookkeeper did; he filled out the check before I signed it.

Q. Now, at that time you were in the red some four or five thousand dollars and didn't have a cent in the bank?

A. I do not know what our statements showed.

Q. And then you gave a note, didn't you, against the B street assessment to pay for this \$1,216.00?

A. My recollection is that there was never no notes; if there was ever any notes given to the bank

by Rector & Daly marked B street notes, I would like to see them, and if they were marked, they were marked after I signed them against any one improvement; that is my recollection.

Q. The fact of the matter is that these payments were made along from time to time by you to the Digger Company from money which came from the Vancouver Trust & Savings Bank?

A. And other banks.

Q. I mean as far as these checks are concerned, of which we have been talking today; they all came from the, or through the Vancouver Trust & Savings Bank?

MR. GILTNER: The checks show for themselves.

A.—Yes; the checks show for themselves, and our money did not all come from Vancouver that paid all of our checks.

Q. I say, didn't you have an understanding, and didn't you tell me, and didn't you testify to it in court, that you had an understanding, and an agreement with the plaintiff, some one of them, the officers representing the plaintiff corporation, that the money which came off of B street should be applied by them on unsecured accounts, on the sand and gravel, or anything else that you owed them for, and because you had security for the material on B street.

A. I will answer that question by saying that I do not think I did.

I testified in court at the time of the trial of

Sparks & Blurock and the Vancouver Trust & Savings Bank in the superior court at Vancouver, Washington.

(Counsel for defendants read):

“Q. Did you have an arrangement with the Columbia Digger Company that you should do that and let the crushed rock account stand because you had a bond to protect you?

A. I think probably we did.”

Q. Let us go back a little on this:

“Q. And you drew checks from the Vancouver Trust & Savings Bank to pay for sand and gravel on other streets?

A. I think so.

Q. Because you got a discount, and let your crushed rock account on B street go?

A. We might have.

Q. Did you?

A. We did not have any B street account.”

Q. Now, I will ask if you did not testify as follows in that case:

“A. The engineer might have given us an estimate but no bonds drawn until along in July or August.

Q. But you got some cash payments in the meantime?”

MR. GILTNER: I will agree that counsel may put that all in evidence—(interrupted)

MR. MILLER: I am simply asking this man if he did not testify to this.

THE COURT: Proceed.

“A. Not on East B street.

Q. Sure of that?

A. Not to my knowledge.

Q. When did you make this arrangement with the Columbia Digger Company that the cash should go on the sand and gravel and the bondsmen stand for the crushed rock?

A. May or June, 1911.

Q. And at that time you did consult Sparks & Blurock?

A. I did not.

Q. But the evidence here, they refused to let you have other stuff unless you paid cash for it?

A. My agreement was to pay cash for sand and gravel, that was my agreement.

Q. Because they insisted?

A. Not because they insisted; they told me that would give me a discount.

Q. For sand and gravel?

A. Yes.

Q. What was the conversation about crushed rock?

A. We didn't have any regular time to pay for the crushed rock.

Q. Was there any discussion that they would let that run because you had a good bond?

A. I don't think so.

Q. They did not make that concession because you had a bond?

A. I don't think so.

Q. Did they know you were giving bonds for B street?

A. I don't think so.

Q. You sent money from the Vancouver Bank without telling them where to credit it?

A. We paid them from Hartman & Thompson's in Portland.

Q. Different funds you had went indiscriminately all together?

A. Yes, sir; all the money we got each and every time went in there, and no B street account.

Q. One thousand dollars was, you said they arranged with you?

A. I think it was later."

Q. Now, there is another place in here that I want to read:

"Q. What arrangement did you have with the Columbia Digger Company with reference to credits of all money you sent them, where and how it should be credited?

A. All the money I should pay for sand and gravel so I would get my discount, that was the arrangement.

Q. That was all the arrangement?

A. All money paid should be applied on sand and gravel so as to keep up our discount, any money to be paid there should be applied on sand and gravel.

Q. Any money should be applied on sand and gravel so as to preserve your discount?

A. So as to preserve—

Q. And your crushed rock should run?

A. Could run.

Q. And that was done?

A. Yes.

Q. And that arrangement was not called to the attention of your bondsmen?

A. I do not think so; in fact, I know it was not.

Q. Do you remember when that arrangement was made?

A. Cannot say now.

Q. Cannot say?

A. No, sir."

THE COURT: Are you going to ask him to answer all of these?

Q. Did you not testify to all of that?

A. If it is down there, and the court stenographer is correct, I must have.

Q. Do you remember whether or not you did?

A. I cannot remember all of those questions. I remember testifying in that case.

Q. And that is true about that, that was the arrangement?

A. In regard to what?

Q. The arrangement was that the money that came off of B street, or any other source, but particularly the money that came off B street, should go to these parties and be applied first to the payment of sand and gravel?

A. No, sir; it was not; that was not the arrangement, any money that came off B street. It did not make any difference where we got the

money, but our arrangements with the Columbia Digger Company was, always was, that our sand and gravel should be cash.

Q. Should be cash?

A. Yes, or practically cash.

Q. What were you going to do about crushed rock?

A. We were going to pay for the crushed rock upon the completion of B street.

Q. Were you not getting estimates, and was not that the understanding, that you would get estimates every two or three weeks from B street?

A. Every month, I think.

Q. Were you going to pay for your crushed rock when you got your estimates on B street?

A. We had twenty per cent retained there which would have taken care of our crushed rock.

Q. Was that the understanding, that you were to keep back—the city was keeping back that twenty per cent and not you?

A. Yes, sir.

Q. Were you not to pay for your crushed rock when you got your money off the street?

A. There was no arrangements made when we were to pay for it.

Q. Were you going to let that street go until it was completed by the city, and drawing your money from time to time, and not apply anything on the crushed rock?

A. If we had sufficient money to pay for it, we would.

Q. Were you not getting sufficient money from the street every month to pay for the crushed rock that went on the street?

A. I do not know whether we were or not. Our estimates were for about eighty per cent of the work done; if we got a correct estimate. We did not have any crushed rock on East B street until sometime in July.

Q. I am not talking about that. I am talking about your arrangement. At the end of June or July, or the end of the month, you were getting an estimate, or you were getting paid for eighty per cent of what you had done up to that time?

A. Yes, sir; I think so.

Q. I want to know, Mr. Rector, whether it is a matter of fact that of the eighty per cent which you did earn, there was not sufficient during all of the time to pay for the crushed rock that went on that street and more, a great deal more, too?

A. I do not know whether it was sufficient to pay for the crushed rock that went on that street and the work we were taking care of, grading and concrete sidewalks at that time; I do not think it was eighty per cent; in fact, I know it was not, because we did not make twenty per cent off that street. If there had been, there would have been money enough—(interrupted)

We did not use bonds from another street to pay for the sidewalks, to my knowledge. I do not know what became of those Connecticut avenue bonds; they were turned into the bank.

Q. Is it not a fact that all of the money that went into this general account with the Vancouver Trust & Savings Bank was money that you borrowed from the bank?

A. That was my understanding; that money that we borrowed from time to time.

Q. Yes; and borrowed from the bank?

A. Yes; the money we took from other banks—I remember one three-thousand-dollar check drawn on the Gresham bank and being put into the Vancouver Trust & Savings Bank. I think it was in July; maybe it was prior to that. I remember depositing a check for \$2,500 from the Schwabacher people with the Vancouver Trust & Savings Bank at one time. I remember those things very distinctly. Those were checks that went for other purposes. All of the money we got from the Vancouver Trust & Savings Bank was deposited to our general account. We could take it and buy a horse with it, or buy rock, or buy sand and gravel; we never had a check turned down by the Vancouver Trust & Savings Bank as long as we had a balance.

I do not know whether the bank knew that we were receiving crushed rock from plaintiff for the improvement of B street. We did not get crushed rock from anybody else.

I do not know whether that question was ever asked of me by Sparks & Blurock until after they took over the improvement, or how I was paying for it.

We got all of this sand and gravel that we sold

and delivered from plaintiff; I think every bit of it. With the proceeds of the sale of that sand and gravel we paid some indebtedness with it; used it for working, and put some of it into the Vancouver Trust & Savings Bank. That was the money that came back to the plaintiff.

RE-CROSS EXAMINATION.

Q. Now, as a matter of fact, you do not know whether a dollar of that ever came back to the Columbia Digger Company or not?

A. Well, it must have; if we checked on our general account, it must have. I do not know whether it was the identical money.

Q. If you put any money into the bank from any of these other sources, there was enough, there were more than enough checks to eat it up in the next few hours?

A. No, sir; we had an account of seven thousand dollars in the Vancouver Trust & Savings Bank on June 6th.

Q. Well, not at this time. Is it not true that practically all of the time, during all of the construction work, you were in the red?

A. It probably was.

Q. And if you put in there the large amount of money that you have testified about, it was to meet some immediate payment, not to these people, but to somebody else, and the money was consumed for that purpose?

A. Might be for the Columbia Digger Company

or for somebody else; might be for feed—(interrupted)

Q. Were these checks that you gave the Columbia Digger Company what you went to the bank and made special arrangements for?

A. No, sir.

We did not get any crushed rock on October 9th. Our bookkeeper at that time was Mr. Love.

Q. Is not that his writing (indicating book)?

A. It does not look to me like his writing. That does not look correct to me; that is the reason I am studying it.

I do not know whether that is our ledger account with plaintiff; I have no way of identifying it; I cannot tell that this leaf came out of my ledger; I would not swear that it was. That (referring to a book) is our day-book; it was kept by Mr. Love. This is his handwriting (indicating).

Q. Look at the bottom of page 117, October 9th. Do you see any crushed rock from the Columbia Digger people there?

A. 401 yards.

Q. Then you were getting rock on October 9th, according to your own books, were you not?

MR. GILTNER: Before he answers that question—(interrupted)

MR. MILLER: Out of his own books.

MR. GILTNER: It may be out of his own books, but the person who put it there should testify to it.

THE COURT: He has admitted it is his own book. Objection overruled.

Q. Doesn't it appear from your own books that you were receiving crushed rock from these people on the 9th of October?

MR. GILTNER: I object to this testimony, for the reason that the item counsel is asking the witness about is an item which is shown to be put into this book by someone else other than the witness himself, and this witness is not able to testify as to the authenticity of the date, as to whether it was put in correctly, or whether it was the exact date upon which they received the rock. It may have been entered afterwards. I think it is competent to ask the witness if he knows whether that is the date or not.

MR. MILLER: You may cross examine him on that.

MR. GILTNER: I object to it as incompetent, irrelevant and immaterial, and not the best evidence, and he has not given us an opportunity to cross examine the person who put the item into the book.

THE COURT: Objection overruled.

Exception allowed.

That is our regular day-book (indicating) kept by our bookkeeper; his name is Love. I could not say where he is at the present time. Those items on our day-book appeared in regular order on October 9th.

Q. And these items appear in the book on October 9th; "October 9, 1911, crushed rock, 401 yards, crushed rock, 402 yards."

MR. GILTNER: There is another date down here, seventh and twenty-fifth. January, February, March, April, May, June, July—it is the seventh month and the twenty-fifth day, showing that it was received, Your Honor, that it was an entry made October 9th of crushed rock received on July 25th.

MR. MILLER: Not necessarily; the book speaks for itself.

MR. GILTNER: Let the court see that.

MR. MILLER: If counsel will wait until I finish, he may cross examine the witness.

THE COURT: Proceed.

Q. These items are for crushed rock, October 9th?

MR. GILTNER: I am willing that the sheet be introduced in evidence, what the book shows about that item.

RE-DIRECT EXAMINATION.

That item on this page 117 under the head of "Crushed Rock," 7-25, and crushed rock, 401 yards. That 7-25 would be July 25th; I should judge that would be it. Mr. Love might not have posted that ladger until that time. These books were all posted up by order of the bankruptcy court. We were in bankruptcy at this time. We were in bankruptcy in April, 1911. The filings were made against us in bankruptcy sometime in February, 1911.

Earl A. Hackett was called as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

DIRECT EXAMINATION.

In the month of September, 1911, I was secretary of the plaintiff, and sort of assistant manager, and ran the steamer. I was master of the boat, and one of the main reasons for being with the boat was to keep track of things. I know the firm, Rector & Daly, and know that plaintiff had business relations with them during September, 1911.

Q. I wish you would state what you did in regard to delivering any material of any kind to Rector & Daly for the improvement of B street, B street in Vancouver, Washington, during 1911?

A. During the year 1911?

Q. Well, in regard to the improvement of B street; yes?

A. Well, we boated rock—(interrupted)

Q. What did you do?

A. Well, I ran the boat for towing the barges.

Q. The barges contained what?

A. Rock from the Riverside Rock Company's quarries at Rooster.

Q. Did you tow all of the rock that was delivered to them for the improvement of B street, that is, to Rector & Daly?

A. I think I did all of it. We had another captain, but, as a general thing I was with the boat and ran the boat.

The last load of rock was delivered to Rector & Daly by plaintiff September 27, 1911. I never in September or November, 1911, or at any other time refused to deliver a barge load of rock from plaintiff

to Rector & Daly until they gave us a check for \$1,000.00

Q. I wish you would explain to the judge, if you have any recollection of making any demands upon them at any time for a thousand dollars, or the reason why it was done, if you did do that?

A. Well, my recollection is that—we delivered a load of rock on September 27, and then, along about October 2nd, we delivered a load of sand, and we were badly in need of money, and I know we went to Rector—we had to keep after him pretty hard about that time to get any money, but I remember of going, along about the first of October, to Mr. Rector, at my father's say-so, to collect some money, and I also told him that we could not furnish any more material unless we got some money. I do not remember whether it was a thousand dollars, or whether a demand was made for a thousand dollars, but I remember I personally told Mr. Rector that we could not furnish him any more material unless we got some money. I never at any time had a barge of rock there and refused to deliver it to him unless he paid us \$1,000.00. The material I had reference to when I told him that was all material. You see about at that time there were a good many rumors afloat—We did not furnish any sand and gravel after October 2nd; I think October 2nd was the last day of any delivery to them, and that was sand.

I remember seeing a paper like plaintiff's Exhibit A. I took it to Vancouver and served it on the

mayor and city clerk and on Mr. Sparks and Mr. Blurock. That was October 17, 1911.

Q. I wish you would state if you had any conversation at that time with either Mr. Sparks or Mr. Blurock about this matter?

A. My recollection is that I did not mention anything, if I remember rightly. I saw Mr. Sparks and Blurock previous to the time that we made this statement, and talked to them in regard to the account.

This was before we served the notice, if I remember rightly, a day or two, or it might have been days. We thought we had to do this to protect ourselves. Messrs' Sparks & Blurock were there. I recollect that they said that they thought there would be money enough to cover it. I served a copy of that notice on each of them personally.

CROSS EXAMINATION.

I told Mr. Rector that we would not furnish any more material until we got some money. I think it was October 5th or 6th, somewhere along there.

Q. Then, at that time what he owed you for particularly was for crushed rock?

A. Yes, I think it was.

We would not have furnished them any more of anything until they paid us some money. We could not afford to because we—we would not furnish him anything, any kind of material unless we felt that he was going to have plenty of money to carry the thing through.

Q. What he owed you for was for crushed rock?

A. At that time, I think there was something like five hundred dollars for sand and gravel. I did not keep the books myself, and I was not so very well versed on that part of the matter; I was on the boat most of the time, caring for the outside part of the work. It may have been \$1,000.00 or \$100.00 for sand and gravel, according to our statement, and possibly \$6,200.00 for crushed rock. We wanted some payments on that crushed rock, because we had to pay for the crushed rock as fast as we got it every month.

Q. And Mr. Rector agreed to pay it as soon as he got it from the city?

A. I do not know as he agreed to pay it as soon as he got it from the city. We were hard up at that time; we had to have money, and we could not wait too long. It was time we had been getting some money from him, from the street, and we were entitled to it.

Q. You knew that you were getting money from time to time from this street?

A. No, sir; I did not know that he got money from the street.

I remember being in your office in the presence of Mr. Sparks, Mr. Blurock and Mr. Sewall, talking about this matter, I should judge that was about the middle of December, 1911. It was in your office in Vancouver, Washington, in the presence of Messrs. Sparks, Blurock and Sewall and Mr. Crass and yourself.

Q. And you told us at that time that you knew

this money was coming from that street, and that were applying it—(interrupted)

A. What is the question?

Q. Did you not tell us at that time—I will change the question: That when you commenced furnishing this crushed rock to Mr. Rector and Mr. Daly on this street, that you had an understanding with them that the money which they received from B street should be applied—(interrupted)

A. No, sir.

Q. Wait until I get through with the question—should be applied on the unsecured accounts, and that you had Sparks & Blurock to fall back on on B street?

A. No, sir; I never mentioned B street. I have understood it is claimed that I said that. I know positively that I never mentioned B street. I might have mentioned and said that the money we received was to be paid for sand and gravel, because it was understood that we were to be paid cash for the sand and gravel, because he got practically cash for it himself.

Q. You were in my office twice?

A. I believe I was.

Q. And I called your attention in this conversation to a decision of the supreme court of the State of Washington, and I told you that you could not do that; that you could not apply—(interrupted)

A. You called my attention to it? You might have called Mr. Sewall's attention to it. I do not remember your calling my attention to anything

there. In fact, I do not remember talking to you. I think Mr. Sewall did all of the talking to you.

Q. You were present?

A. I was present, but I never talked to you personally.

Q. Did you not say that that was the understanding; that you were to apply the money you got from B street—(interrupted)

A. I never mentioned B street at all; I am positive of that.

Q. You remember the conversation?

A. To a certain extent; such as a man could.

Q. Do you remember my calling your attention to a decision of the Washington supreme court?

A. No, sir; not to my attention; probably to Mr. Sewall's. I do not think you talked to me at all. I think Mr. Crass did most of the talking.

Q. Didn't I get that decision down and read it there in the presence of Mr. Sewall?

A. I do not remember it; it is possible that you did, but I do not remember.

Plaintiff Rests.

MILTON EVANS, called as a witness on behalf of the DEFENDANTS, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

In the year 1911, I was assistant cashier of the Vancouver Trust & Savings Bank. I was acting cashier while Mr. Eichenlaub was in Europe. During the year 1911, the Vancouver Trust & Savings Bank received from the City of Van-

cover money on account of the improvement of East B street. We received bonds, the same as money. Those bonds were turned into cash.

Q. On what account was this money received?

A. We had an order for the bonds from Rector & Daly for the city to turn them over to us. Defendants' Exhibit 8 is that order.

The first payment was a cash payment; that was money paid in in cash by the property owners along the street before the bonds were issued. The paper you hand me is a cancelled warrant for \$10,046.17, dated August 8, 1911, by the bank.

MR. MILLER: I would like to offer that in evidence.

MR. GILTNER: For what purpose?

MR. MILLER: For the purpose of showing that the bank received during this time from the improvement some \$23,000 or \$24,000. I will follow it up with other receipts; that these checks which were issued by these people were paid from this money.

MR. GILTNER: I desire to offer a formal objection at this time to the introduction of this warrant. My objections are these: Unless they can prove, and follow it up and show that the identical money that Rector & Daly paid to the Columbia Digger Company was the money that was obtained on this warrant, that it is incompetent, irrelevant and immaterial, because, I understand, under the decisions of the State of Washington, and all of the decisions that I have read,

that you must prove that the identical money that was received from the improvement was paid by the debtors to the material men, and unless he can prove that that identical money was paid by Rector & Daly to these people, then I object to the introduction of this evidence.

THE COURT: You will be heard upon that in the final consideration of the case. Objection overruled.

Exception allowed.

MR. GILTNER: I want to object on the ground that it is irrelevant, and does not prove that this money was the identical money paid by Rector & Daly to the Columbia Digger Company on account of anything.

THE COURT: Objection overruled.

Exception allowed.

THE COURT: It may be admitted.

MR. GILTNER: Subject to my objection?

THE COURT: Subject to the final consideration of the case, after the briefing and the argument.

WHEREUPON said document is admitted in evidence and marked Defendant's Exhibit No. 9, of this date.

That is my signature (referring to paper).

Q. Did the bank receive bonds from the city clerk for that amount?

MR. GILTNER: Do not answer that question until I see that paper. (Counsel examines paper.) I object to that, if the court please, because this is a self-serving declaration, and also for the reason

that it is not the best evidence. It is simply a receipt for the receipt of some bonds, and it is incompetent, irrelevant and immaterial.

MR. MILLER: I do not know how you can get any better evidence than the official records of the clerk's office.

MR. GILTNER: Official records do not prove anything.

THE COURT: Objection overruled. It may be admitted.

Exception allowed.

A. Yes.

Whereupon the paper was admitted in evidence and marked Defendants' Exhibit 10.

Q. What is that, Mr. Evans, which you now hold in your hands?

A. This is a receipt by the bank to the city clerk for seventy-five hundred—(interrupted)

MR. GILTNER: Now, to save time—have you any more of these?

MR. MILLER: Yes.

MR. GILTNER: I object to the introduction of all of these papers, and have the same ruling—(interrupted)

THE COURT: Are they all similar to the first one; receipts given by this witness to the city clerk?

MR. MILLER. Yes.

THE COURT: Objection overruled. Exception allowed.

MR. GILTNER: As to all of these?

THE COURT: Yes, they may be admitted.

MR. MILLER: I will now have them marked as one exhibit.

WHEREUPON said papers are admitted in evidence and marked Defendants' Exhibit No. 11 of this date.

THE WITNESS: I do not know whether that is on East B street or not (indicating).

MR. GILTNER: I thought you said that they were all the same.

MR. MILLER: Yes.

MR. GILTNER: Well, they are not; the others are off B street, and that is not (indicating). I object to these because the witness says he does not know whether they came off B street or not. I object to that because the witness testifies that he does not know whether the bonds that he received were bonds on account of the improvement of East B street, and also for the further reason that it is not the best evidence; the bonds are the best evidence, and it is incompetent, irrelevant and immaterial.

THE COURT: Objection overruled. It will be admitted as a circumstance.

MR. MILLER: That is all we ask.

Exception allowed.

The bank sold these bonds to Carstens & Earles, Seattle. The money that was derived from the sale of the bonds, if there was any left, was placed to the credit of Rector & Daly; most of it was for taking up their notes.

MR. GILTNER: I object to that and move to strike that part of it, because the books are the best evidence.

Q. What record is kept of this on the books?

A. Every time we received any money, a record was kept of it.

MR. GILTNER: I move to strike that as not the best evidence.

THE COURT: The witness is testifying evidently from his recollection. Motion denied.

Exception allowed.

The money went to the Rector & Daly account. There was a discount on the bonds. The bank paid Rector & Daly either 87½ or 87 cents. They did not get credit for the full face value of the bonds. The first credit on this first exhibit was for cash, and the other was bonds. I have not charged up how much this would amount to. The bank received no further money from East B street, except these bonds and that warrant. I do not of my own knowledge know how much cash the bank received in the settlement that was finally reached in the suit between Sparks and the bank. It was in the neighborhood of \$10,000.00. I do not know how much the bank received as a result of that litigation out of what was left when the contract was drawn up. I do not know as I was in the bank at that time. The arrangement that was made with Mr. Rector about advancing money to take care of the B street improvement account was that the bank was to advance him money from time to

time on the estimates of the city engineer for the work done, the rate it was advanced—he gave a note for it until the bonds were issued. It was advanced on the security of this assignment.

Q. Was there any other money loaned to Rector during that time on any other account?

A. Why, there was—I think not.

I have got part of the bank books here.

Q. Taking up the account of July 5th, 1911, at the time that the check for \$1,017.49, being defendants' Exhibit No. 5—can you tell from the bank books the standing of Rector & Daly at that time, and out of what funds this check was paid? This is the check for \$1,017.49.

According to the bank books, Rector & Daly, on July 6, 1911, had a balance to their credit of \$6.82. The check, defendant's Exhibit 5, together with several checks on the same date, overdrew their account \$1,327.79. The next day, or that same day after banking hours, or else the next morning, Mr. Rector deposited \$2,300.00. The deposit was made July 7th, either on the morning of July 7th or else on July 6th after banking hours.

Q. Do you know where that \$2,300.00 came from?

A. I think it came from a note.

MR. GILTNER: I move to strike that answer.

THE COURT: Motion granted.

Q. Have you the note book here showing?

A. I have a record here that would show that.

Q. Will you get that record please?

(Witness produces book and papers.)

Q. Now, will you turn to that record of notes and see whether or not a note was given on that date?

A. What date was that?

Q. July 6th.

A. (Consulting book). On July 7th—the note was dated July 6th—it was noted of record July 7th—it was given on July 6th after banking hours, evidently, for \$2,300.00.

MR. GILTNER: Is that your handwriting?

A. No, sir.

MR. GILTNER: Whose writing is that?

A. Otto Zunstead.

MR. GILTNER: Did you see him put that in there?

A. Yes; I look these books over every night.

(By MR. MILLER):

Q. Was that the regular bank book kept at that time?

A. Yes, sir.

Q. What is that book you hold in your hand?

A. That is the note register.

MR. MILLER: I would like to offer in evidence this line:

MR. GILTNER: Just a minute. Have you made any effort to obtain the original note?

A. No, sir; Mr. Rector has got that.

MR. GILTNER: Have you made any effort to get that note?

A. No, sir; I never asked him for it.

MR. GILTNER: We, therefore, object to the introduction of this secondary evidence; it is not the best evidence, and no evidence that they have made any effort to get the best evidence.

MR. MILLER: I do not know what better evidence there can be than this.

THE COURT: Objection overruled. Exception allowed.

(By MR. MILLER):

Q. I will ask the witness to read that line into the record.

A. "Entered on July 7th; Rector & Daly indorsers; security, collateral estimates East B street No. 811, dated July 6th, 1911, payable on demand, \$2,300.00; nine per cent interest. Paid September 11, 1911."

After the note was paid it was given to Mr. Rector. The collateral security for that note, according to our record, was the estimate on East B street. That was the only funds that he had on hand at that time. He was overdrawn \$1,327.79. After this check was paid, there would be left to his credit from that note \$931.80—that would not be quite right; he had a little deposit that day of \$40.41, leaving a balance of \$931.80. That is the same day.

Q. Calling your attention to defendants' Exhibit No. 1, of August 8th, could you tell from your records out of what fund that check was paid?

THE COURT: What is the amount of that check?

MR. MILLER: \$1,216.00.

THE WITNESS: What is the date of payment?

MR. MILLER: Payment, August 11th.

MR. GILTNER: The court understands my objection goes to all of this testimony, for the reason that in the Federal court they have right to make an equitable defense to an action at law, which he is undertaking to do there.

MR. MILLER: We contend that it is not an equitable defense in any event.

A. That check was presented and turned down; payment refused for want of funds. He was at that time overdrawn in his account, and the check was then returned to the bank and protest—the check was then protested and afterwards returned to the bank on August 11th, and Mr. Rector made a deposit by giving his note for \$1,306.00, which was placed to his credit on that date.

This money must have been paid out of that note by this check, for he was still in the red after it was paid. All of these notes were secured by the estimates on East B street. The amount of that note was \$1,306.00. The original amount of the check was \$1,216.25 and it was raised to \$1,219.00, because of protest fees. When the check was presented, there were no funds to take it up. At that time he was in the red \$661.93. All of the notes that were taken from Mr. Rector were secured by this assignment of the work he done on East B street.

MR. GILTNER: Does that book show this se-

curity was given for that, that note of \$1,306.00?

A. No, sir; this note was not secured by that. This was secured by a sight draft on Sanborn, Cutting Company, of Astoria.

(BY MR. MILLER) :

This was the check, if the court please, which was marked as payment for crushed rock.

The check for \$3,000.00, September 6th, was paid by a note for \$4,000.00, but it does not show what the security was.

Q. Is that the note which I hand you?

A. (Examining paper) Yes.

Q. Now, what was that note against, Mr. Evans, of your own knowledge, without the book?

A. It was against the assessments on East B— against the estimates on East B street.

His condition prior to the time this note was given was that he had a balance of \$375.88. That was the balance before the note and check were given. This check was not protested; it is marked "Insufficient funds," and not undoubtedly went back to the bank and was then called in. These marks on the back indicate the bank it came through.

Defendants offer in evidence the note for \$4,000.00, and the same was, without objection, admitted in evidence and marked Defendants' Exhibit 13.

The papers that I hold in my hand are deposit slips, passed in with the deposits; they form a part of the records of the bank, made while I was in the bank and cashier. They are from the bank; brought here by me, and have been in my custody all the

while. The check for \$859.90, dated July 17, 1911, was paid by a deposit made on July 18th. A note was given for \$2,079.40. Before the note was given he had overdrawn his account \$2,565.43. He gave his note for \$2,079.40. The note was made up of estimates on Fourth Plain for \$990.40, East B street \$574.20 and Connecticut avenue \$514.80. That note was paid September 11th. I cannot tell out of what fund it was paid.

On September 7th we received \$7,500.00 worth of bonds from the East B street improvement. On September 11th he made a deposit of \$11,046.17, and also made some other deposits, \$257.57 and \$67.70 on the same date. I do not know where that large deposit came from; I have not that.

MR. MILLER: We did not bring those here. I want to state to the court in fairness to ourselves, that we have not the September deposit slips; we overlooked them.

THE COURT: This case is evidently going on until tomorrow, I will say for the benefit of both sides.

MR. MILLER: Well, I do not think we can get them here by morning.

On the date of the check for \$501.00 he had money to pay it.

Q. Can you tell out of what funds the check was paid?

A. I can tell you what the deposit was. The day before he was in the red, and the day before he gave us a note for \$5,770.00, secured by estimates

for work done on East B street, and \$1,115.75 was money that was paid in by Mr. Norris. The day before he was overdrawn \$31.42. Then he gave the note for \$5,770.00, based on estimates on East B street. They were both deposited on the same day.

CROSS EXAMINATION.

He paid that check with that money that was put on deposit. I could not tell whether it was paid with the \$1,115.75 paid by Norris or with the \$5,770.00 borrowed on the note; they were both together.

Q. And your testimony applies to all of the other deposits or payments or checks where there was a co-mingling of other deposits, you are not able to tell with what he paid the checks?

A. Wherever there was co-mingled deposits; no, sir.

Q. You are not able to tell with what money he paid the checks?

A. No, sir.

Q. Now, you have testified in a general way, Mr. Evans, in the beginning of your testimony, whether you did it advertently or inadvertently, that all of the moneys that were advanced by the bank to Rector & Daly were advanced on the credit of the assignment of Rector & Daly of warrants coming from East B street.

A. I think I said that.

Q. You are mistaken about that?

A. I was mistaken about that to this extent;

that there was estimates on Connecticut avenue and Fourth Plain avenue.

Q. Did you know that when you made the general statement to the judge?

A. Yes, sir.

Q. Why did you not qualify it instead of leaving it stand?

A. I made a mistake, that is all.

Q. You made a mistake about that?

A. I did not think there were any estimates on Fourth Plain avenue after the 1st of July.

MR. GILTNER: I move to strike that answer as not responsive to the question. I am not asking him what he thinks; it is not responsive to the question.

MR. MILLER: It is an explanation.

THE COURT: Motion granted.

THE COURT: This July 17th referred to, was estimates on Fourth Plain?

A. Yes, sir.

There were no written contracts made by Rector & Daly with the bank. Most of the verbal agreements were made by Mr. Rector. I was present most of the time. I was not present all of the time when these notes were given, but I was consulted before the notes were given. Mr. Rector was not always present when I was consulted.

Q. Then the testimony you have given here in regard to the securities that were given by Mr. Rector for a great portion of the moneys that he ob-

tained from the bank was what Mr. Bouten told you, isn't it?

A. Some of it.

Q. And Mr. Rector was not present?

A. Not all of the time; some of the time he was.

Q. Can you testify now to any particular occasion when he got any particular amount of money that you have testified to, wherein he agreed with Mr. Bouten that the moneys that he should obtain from the bank would be secured by this assignment, or that verbal contract, or the assignment of the warrants derived from the improvement of East B street? Can you tell any one time?

A. I do not know as I can.

I have testified in regard to notes for \$5,770.00, \$2,079.80, \$1,306.00 and \$4,000.00

Q. There was obtained on June 16, 1911, \$192.-50 from the bank, was there not, or notes given for \$192.50?

A. I expect so; yes.

Q. And the total number of notes given, taking my count for it, sixteen notes were given by Rector & Daly for the sum of \$25,220.74, obtained from the bank?

A. I expect so.

Q. Don't take my word for it.

A. I think those notes are correct; they look like it.

Q. Are you able to tell the court here, of your own knowledge, where Mr. Rector for Rector & Daly gave the note of Rector & Daly to the bank for

any one of these sums where the security for the payment of the note was the assignment or verbal agreement between Rector & Daly and the bank for the proceeds of the warrants to be derived from the improvement of East B street, of any particular time?

A. The security of these notes I have testified about was the assignment that was put on record in the clerk's office. And that is the only way I know it. I do not remember whether I was present when the agreement was made between them.

Q. Is it not a fact that all you know about it is what Mr. Bouten told you about the security and that agreement?

A. Yes; all of the assignment.

Q. Is it not a fact that all you know about it is from the assignment itself and what Mr. Bouten told you?

A. Mr. Bouten and the balance of the board of directors.

Q. And was Mr. Rector there at the time they told you these things?

A. Not always; sometimes he was.

Q. What time was he when any particular amount you can name—(interrupted)

A. I could not say; I could not remember.

MR. GILTNER: I move to strike out all of that testimony in regard to the application—the testimony given with regard to the security for these notes and the application of the moneys, derived from different sources for the payment of these

notes, because the testimony is hearsay, and he is not able to testify of his own knowledge of any particular item, except what he was told.

THE COURT. Motion denied. Exception allowed.

These papers that I testified from are the individual ledger sheets of the account of Rector & Daly, the defendants in this case. They are the original records. The column marked "Debit" is where the checks are entered, and these credits here (indicating) are deposits.

These ledger sheets were offered in evidence by the plaintiff, and the same were, without objection, admitted in evidence and marked Plaintiff's Exhibit C and D.

RE-DIRECT EXAMINATION.

When I use the expression "In Red" I mean that whenever a party overdraws his account, the amount is put down in red ink, and it means that the account is overdrawn to that amount.

Q. In your examination yesterday afternoon in speaking of defendants' Exhibit No. 1, check originally for \$1,216.00 and the line on the note book indicating that some additional security was given for that check; do you remember that?

A. The note on that date was for \$1,306.00. Is that the one you have reference to?

Q. Yes; that is the one I have reference to.

A. The note was given on that date for \$1,360.00; it was the same date that the check was paid. The record shows that the note was given on a sight

draft drawn on Sanborn, Cutting Company, Astoria. I know about that sight draft personally.

MR. GILTNER: I object to that. If the note was issued on that security, whether they collected it, or whether it was good or bad, does not make any difference if the money was secured on it.

THE COURT: Objection overruled. This proposition being developed about where the money came from to pay these things, if the note was not paid it might have some bearing upon that. Exception allowed.

I remember personally about the giving of that note. I will explain the whole transaction. Mr. Rector came in the day before this note was given and wanted some more money to complete his work on East B street, and Mr. Bouten called a meeting of the board of directors that night to discuss this matter, and this note was authorized by the board of directors, and Mr. Bouten had there this sight draft on Sanborn, Cutting & Company, and he reported to the board that Mr. Rector—well, I heard Mr. Rector this same day offer this sight draft on Sanborn, Cutting & Company as additional security. This was discussed in the board meeting. The money was borrowed to proceed with the work on East B street.

Q. What was the note made a charge against?

A. What was the security, do you mean?

Q. Yes; what was it based against?

A. It was based against this assignment on East B street. That security was never collected.

It was sent in through the usual course of correspondence, and it was returned marked "unpaid." The bank received nothing on this sight draft.

Q. I call your attention to defendants' Exhibit No. 2. I omitted this yesterday—I overlooked this one—this is a check for one thousand dollars. Do you remember the circumstances of the giving of this check?

A. I do; yes, sir.

Q. Did you have a conversation with Mr. Rector or Mr. Daly about it. Mr. Daly came into the bank one morning—(interrupted)

Q. Of Rector & Daly?

A. Yes; and told Mr. Bouten that he had drawn a check for a thousand dollars—he did not say he had drawn it—that they had issued a check for a thousand dollars to the Columbia Digger Company, and that there was a barge of rock—he did not say whether it was on the way or whether it was there, but that there was a barge of rock they could not have unless this thousand dollars was paid, and it must be paid, or they would have to quit work.

Q. What was done, if anything, in regard to giving a note for one thousand dollars?

A. I do not remember of it. Our record shows the date October 10th. They gave a note on the 14th to cover that check.

MR. GILTNER: Read the record.

A. "Rector & Daly, by A. B. Rector, President, No. 1080, October 14, 1911; ten days after date; due October 24th, \$1,022.00." That was paid on

7-3-12, that is, July 3, 1912. That was paid on July 3rd, 1912. The date it was given was October 14, 1911. At the time plaintiff's Exhibit D was given, Rector & Daly's account was just balanced. I was in the bank at the time this work was being carried on. I remember that there were deposits that came in there to the credit of Rector & Daly from Wilds and from other sources. They were placed to the credit of Rector & Daly and checked out in the usual course of business; checked out about as fast as they came in, and faster, too.

RE-CROSS EXAMINATION.

I do not think that there was an agreement between the bank and Mr. Rector that he could overdraw his account there. If there was, I never heard anything about it. There was an agreement that he should be advanced money on these estimates. There was no permanent agreement that he should be advanced money on these accounts. He came in occasionally and said that there were checks out, and that he would like to have them taken care of, but there was no understanding or agreement. There was an occasion where he overdrew the account of Rector & Daly, and there was no agreement that he should overdraw it. Sometimes the bank honored these checks and sometimes it did not.

Q. Did it ever happen in regard to the improvement on or money drawn on account of East B street?

A. Yes, quite frequently. He was ordinarily called up that same day, or came in that day usually,

after the bank closed, or during banking hours.

Q. Take this thousand dollar note: This note was given on October 14th, three or four days after the check, was that thousand dollars an overdraft?

A. The check was not there at the time that he came in and made arrangements to honor it; he said he had drawn it, and if we did not honor it he would have to quit.

I was supposed to keep the book that I have been reading out of with reference to this \$1,000.00 note, but I did not do it all of the time. It was kept under my supervision. The entering this \$1,022.00 note, October 14, 1911, was done under my supervision. I was present when it was done and knew the entries that were being put in there.

Q. Why didn't you, then, if this note was given as security on the estimates that were to be given on the East B street improvement, enter that in there as the reason for which this thousand dollar note was issued, in addition to the fact that this sight draft was given as collateral security for the payment of it? Why didn't you enter that in there?

A. I did not think it was necessary.

Q. Now, you made a statement about Mr. Daly coming in there about the holding up of a barge of rock?

A. Yes, sir.

Q. Do you know whether this was true or false, of your own knowledge?

A. Only what he said.

Q. Is it not possible that he told you that they

had to have a thousand dollars to pay for material, and that unless they got that thousand dollars they could not get any more material, or words to that effect?

A. Well, he said that there was a barge of rock.

Q. Don't you know that Rector & Daly a number of times passed out checks on the Hartman-Thompson bank in Portland, Oregon, and put them in the bank and got credit on them?

A. Yes, sir.

B. L. DORMAN, witness called on behalf of the DEFENDANTS, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am the city engineer of Vancouver, Washington, and was working for the city during the summer of 1911, as principal assistant city engineer. The engineer was H. H. Lotter. I had something to do with the making out of the estimates on B street. I know that estimates were made and turned into the city the first of every month; once a month. This bunch of papers are those monthly estimates of Rector & Daly, contractors on East B street; estimates of the work done up to the first of each month on the improvement. The first estimate was on April 1, 1911. I think the last one is December 1st, the same year.

MR. MILLER: I would like to introduce these in evidence, if the court please.

MR. GILTNER: Let me see those.

CROSS EXAMINATION.

The paper dated Vancouver, Washington, November 1, 1911, is not in my handwriting. I did not write that. It was made out by H. H. Lotter. He and I figured out the estimates a great many times. I did not make out those figures \$2,108.00; I probably worked it up.

Q. I am asking you whether you know whether you did or not?

A. Not entirely, perhaps, I did not. I usually brought in my field work of the—field book of the work the men did on the street; that was my business. My field books are in the office at Vancouver. A great many times I would write the estimate and he would make a notation of it and put it into the book. I cannot positively say whether I calculated those figures every month of the time or not. They are not in my handwriting. I would not say positively whether I made all of those estimates or not, but I usually and most always helped him to compute the estimates. Those are the original estimates of the city made under this contract; they are the official records of the clerk's office. I have seen them in there, and I know they were filed. I know the signature of the city clerk; that is his signature.

MR. MILLER: I will be sworn and say that I got them from the city clerk myself.

MR. GILTNER: Well, did you?

MR. MILLER: Yes, I did.

MR. GILTNER: Well, that is all right.

These estimates were thereupon offered by the

defendants in evidence, and received in evidence, and marked Defendants' Exhibit No. 14.

The witness further testified:

These are all of the estimates of East B street; they are the entire estimates turned in by the contractor.

CHARLES DALY, called as a witness on behalf of the DEFENDANTS, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am one of the original members of the firm of Rector & Daly. I am the Mr. Daly who has been referred to here. I remember the issuance of a check for \$1,000.00 on October 10, 1911.

I could not tell the exact date when I got the check; it was somewhere between the 5th and 15th of October. Mr. Rector called me up from Captain Hackett's office in Portland, and told me that they would not unload a barge load of rock which was at the dock, and had been there for some time, unless we paid them a thousand dollars. I went up and got Mr. Stapleton, one of the directors of the bank, and also the attorney for the bank, and went down to the bank and saw Mr. Bouten, and he let me have the money, and I 'phoned back to Portland to Mr. Hackett.

THE COURT: Did I understand you to say that any particular amount of money was mentioned?

A. A thousand dollars; yes, sir. That was what I borrowed from the bank. It was mentioned in the conversation from Mr. Rector. Mr. Rector drew

the check; I did not draw it. He, I think, gave it that morning over there. The signature on defendants' Exhibit No. 1 is his handwriting. I think the body of the check is Mr. Love's handwriting.

I know there was a barge at the dock there, as it was set in and out from the dock several days. The Barber people were unloading rock from the same dock. These people had a barge of rock there at that time, but I do not know how long it had been there.

I did not personally give a note for that \$1,000.00. Mr. Rector signed the note. I was not, personally, over at Vancouver during the construction of this work very much; I was there very little. Mr. Rector had charge of the work. I was on the Bull Run pipe line until the latter part of August.

I remember throwing up the contract. The time we surrendered it to our bondsmen I think was somewhere near the 15th and the 20th of October, 1911. We entered into an arrangement with Mr. Bouten to carry on that work. He was to advance us money for the material on B street, and the contract was assigned over to him, and all the estimates was made out to him, and by doing that way, he was to advance us the money from time to time to carry on the work on B street. He was to get his money on the estimates once a month. The contract with the city provided for the estimates once a month. We were to be paid by the city once a month. The first of each month we were to get an estimate less 15 per cent; I think some was 15 per cent and some was 20 per cent.

CROSS EXAMINATION.

Q. Mr. Daly, do you know whether Captain Hackett, or anybody connected with the Columbia Digger Company, was present at the time Mr. Rector telephoned to you in regard to the thousand dollar check?

A. I could not very well, with him in Portland and me in Vancouver.

Q. You do not know whether they were present or not?

A. No, sir.

MR. GILTNER: If the court please, I move to strike out that testimony as substantive testimony against the Columbia Digger Company, the—as to showing that the check was given as against the Columbia Digger Company. I think it is competent against any testimony that Mr. Rector gave, but as against the Columbia Digger Company, that conversation could not be in evidence against them; they, not being present, could not be bound by that testimony. They have their side of the story, and they have testified as to why that thousand dollar check was given. Counsel has asked Mr. Rector on cross examination, and brought this matter up about that thousand dollar check, concerning which we asked him nothing. That was brought out directly by Mr. Miller. This evidence might be introduced as against the conduct of Mr. Rector, but it cannot be used as a substantive evidence and the purpose for which the money was obtained as against the Co-

lumbia Digger Company, because the evidence here shows that none of them were present.

THE COURT: If it is competent for any purpose, there is no way to strike it out.

MR. GILTNER: Well, I wish to have the record show that it is not competent evidence as against the Columbia Digger Company, because the evidence shows that they were not there at the time this conversation took place.

THE COURT: That is something to be argued on the merits.

MR. GILTNER: Would not the court make a ruling on a question of that kind, that it should not be taken as evidence as against them?

MR. MILLER: It is before the court. What is the use of it?

MR. GILTNER: There is a whole lot of use of it.

THE COURT: I cannot advise you as you go along as to what weight should be attached to every bit of evidence that is in. Exception allowed.

We surrendered this contract on B street to Rector & Daly sometime between the 15th and 20th. I know when I did that, but I cannot give you the real date. We abandoned that contract at the same time we turned it over to the bondsmen. We did not abandon it prior to that time, abandon the work on it. I was there at the time. I was not present when this contract was made with the bank for the advancement of money to Rector & Daly for the carrying out of the purchase of material for the im-

provement on B street. It was made by Rector & Daly and the bank.

Q. All you know about it is what has been told you by somebody else. All you know about what the contract was for, or the consideration of the contract, was what somebody told you?

A. Mr. Bouten told me and Mr. Rector.

Q. Did you have any conversation with Mr. Bouten in regard to advancing money to Rector & Daly on B street prior to the time that this paper was made by Rector & Daly?

A. No, sir—yes, I did, too. That conversation was before and afterwards. I talked with Mr. Bouten about that before; Mr. Rector was with me. We met Mr. Bouten on the street and talked about it, and he told us it could be arranged to get money from the bank, and I talked with Mr. Rector over the 'phone several times, and knew the time the contract was made and what it was.

I did not go down to the dock to see if there was a barge of rock there in possession of the Columbia Digger Company at the time Mr. Rector telephoned to me that they would not release it to us or turn it over until the \$1,000.00 was paid. I just came from the dock before that; I know it was there; I had been there to the dock every day fifteen or twenty times every day for several days. The barges were delivered to Rector & Daly when unloaded onto the dock. Rector & Daly did not have the right when they were released there by the tow-boat, to unload them onto the dock when the tow-boat left.

They had no right to unload barges at any time. The plaintiff unloaded them, I suppose; it was their plan to unload them. It was the duty of plaintiff to unload this barge of rock into the bunkers in delivering it to Rector & Daly. I was not present when the contract or agreement was made between the parties as to what should be delivery.

RE-DIRECT EXAMINATION.

I saw it when I was back and forth from the dock.

JOHN J. CASPARY, called as a witness in behalf of DEFENDANTS, being duly sworn, testified as follows:

DIRECT EXAMINATION.

The statement handed me, which purports to be a statement of account between plaintiff and Rector & Daly, was made out by me. It was taken from plaintiffs' books at the time it purported to be dated. I was then bookkeeper of the plaintiff.

MR. MILLER: I desire to offer this in evidence. It is a statement made by this witness of date December 30, 1911, in which there is no application of these payments in the manner which they now indicate that they have been applying them. It is simply a running account.

Q. Do you know whom that was given to?

A. No, sir; I do not.

MR. GILTNER: I would like to ask a question or two before that is done:

Q. I wish you would look at this statement and state if that is a correct copy of your books?

MR. MILLER: I did not ask him anything

about that. That is not proper cross examination.

Objection overruled.

Q. In regard to the application of payments?

A. These statements were not made at the same time.

Q. Is it not a fact that you testified yesterday that your books show a notation on the side of the application of these payments?

MR. MILLER: I object to that as improper cross examination.

Objection sustained.

A. I did not examine these statements carefully at the time I first made the examination. These statements were drawn on different dates, and the application of the thousand dollars here—I made that application wrong.

Q. In what respect?

A. Well, I credited it here on the rock account, when my notation does not say anything about the rock account, the notation in my ledger.

Q. Well, you made those, did you?

A. Yes, sir.

MR. GILTNER: Well, I think they are entitled to go on record if you made them.

MR. MILLER: You made them from the books?

A. Yes, sir.

THE COURT: They may be admitted.

WHEREUPON, said papers are admitted in evidence and marked Defendants' Exhibit No. 15.

MR. MILLER: I want to offer in evidence a

paper, the statement which this witness identified yesterday. No objection.

WHEREUPON, said statement is admitted in evidence and marked Defendants' Exhibit No. 16.

M. R. SPARKS, called as a witness on behalf of the DEFENDANTS, being duly sworn, testified as follows:

DIRECT EXAMINATION.

I am one of the sureties on the bond of Rector & Daly. I know Mr. Hackett, who testified here yesterday. I had a conversation with him along in the fall of 1911.

I have seen defendants' Exhibit No. 15 before. Mr. Hackett, or Mr. Sewall, one or the other, handed it to me; I think it was Mr. Hackett. I was present in your (Mr. Miller's) office when a conversation was had between Mr. Hackett, Mr. Miller and others. It was late in December, 1911, I think; I am not sure. There were present Mr. Hackett, Mr. Sewall, Mr. Miller, Mr. Crass, Mr. Blurock and myself.

Q. Now can you tell the court what Mr. Hackett stated to those present as to his arrangement with Rector & Daly, and what application they had been making of the payments of the money received from the work on B street?

A. He plainly said that Sparks & Blurock were supposed to be able to pay this deficiency on B street, and that they had credited all of the money they had received from B street on their sand and gravel ac-

count, because the bond was supposed to be amply sufficient to pay the rock account. He said that he had an understanding with Mr. Rector to that effect. That Mr. Rector was to pay the value of the sand and gravel, and leave the other amounts stand. He said that all of the money they had drawn from the B street account had been applied on the sand and gravel account.

Q. You do not understand. What, if anything, did he say as to the arrangements with Mr. Rector as to how the money coming from B street should be applied?

A. I do not remember exactly how he worded that, but he admitted plainly that he had not given us credit for any of the rock, any of the payments that came from that street, on the rock account.

Q. During the time, did you know anything about what application they were making of those payments?

A. I had talked with Mr. Rector numerous times during the summer, and he said he was keeping his payments up. I had looked at the bank records. They had shown me that they had paid Rector & Daly checks.

I know nothing about the arrangements between Rector & Daly and the people furnishing the material, as to the arrangements they had as to the application of the payments.

CROSS EXAMINATION.

I first learned that plaintiff was furnishing crushed rock on this street early in July, 1911. I

heard it from Mr. Rector. I do not know when they first started in to deliver; that is the first I knew of it. Mr. Rector was working on the street there at that time. I know that he had turned over these payments of these warrants to the bank. I think I first learned that along early in July, 1911. I could not say when exactly.

Q. You say you do not know what the young Mr. Hackett stated as to what arrangement Mr. Rector had with the Columbia Digger Company in regard to the pay for the sand and gravel?

A. Well, he said that they had arranged to—(interrupted)

Q. I understood you to say that you did not know what it was?

A. All right; if I said I did not know, that goes.

Q. Well, do you know?

A. No, sir. Mr. Rector told me that he was making payments to plaintiff. It was my business to inquire, to see that it was kept up. I did not go to the plaintiff to find out whether he was telling the truth or not. I saw checks were being paid. I did not make any effort to find out from plaintiff as to whether he was, or had made any payments on this. Mr. Blurock and myself were not partners; just individuals.

Q. Now, Mr. Sparks, in order to clear this up and save further time, and get away, I would like to ask you several questions in regard to the amount of money that was owed on this improvement of East B street after you took hold of it?

MR. MILLER: I do not think it is material; they had to complete the contract, and they did complete it.

MR. GILTNER: I want to show how much money they received and paid out. I think the court is entitled to know that.

MR. MILLER: What materiality has it?

MR. GILTNER: It has this materiality: I contend here that they received enough, if not more than enough, to pay this account, and that they disregarded it, paid everything in Vancouver, and paid these people nothing, and that they had in their possession, after they had paid these other bills in full, some fifteen hundred dollars, and they still have that in their possession.

MR. MILLER: It is not proper cross examination.

MR. GILTNER: I will make him my own witness, to save time.

MR. MILLER: My position is that it is wholly immaterial. If these people have not paid for the rock that they put on East B street, that ends it, so far as they are concerned; if they have not been paid, then we are liable, if we are liable at all, and what we did with the street after we took charge of it, whether we paid off the rock claims against it or not, is of no consequence to them.

Objection overruled.

Q. Now, Mr. Sparks, is it not a fact that at the time that Mr. Sewall and Mr. Miller, and Mr. Blurock and Mr. Earl Hackett and Mr. Crass had that

conversation in Mr. Miller's office, that they met there for the purpose of compromising or settling this claim of the Columbia Digger Company? Is not that a fact?

A. I think not.

Q. Is it not a fact that at that time and place you people offered to settle this bill with the Columbia Digger Company by paying them approximately fifteen hundred dollars?

MR. MILLER: I object to that as incompetent.

MR. GILTNER: I intend to follow that up with another question.

THE COURT: Are you going to prove his admissions with an offer to settle—(interrupted)

MR. GILTNER: Your Honor will find that I do not want any advantage in this, and I do not propose to do that in my brief, and I want Your Honor to particularly know right now that I am not asking it for that purpose.

THE COURT: Objection overruled.

Q. Is it not a fact that it was stated at that time that you had fifteen hundred dollars over balance left after having paid the bills for the completion of that street?

A. It may have been mentioned, although I think not, that day. I did not make that statement. I do not think Mr. Blurock made it. I do not think it was made. I did not state it was made at all.

Q. Did you have that amount over?

A. We did. We never paid any of that money to the plaintiff. We still have a part of that money. I

could not tell what were the bills of Rector & Daly when they turned this over to us; could not tell what they owed Mr. Wentworth; I have no books with me.

Q. Did you not testify in the case of W. R. Sparks and C. A. Blurock, plaintiffs, against the Vancouver Trust & Savings Bank, a corporation, defendant, in the Superior Court of the State of Washington, in and for the County of Clarke, as follows—and before you testify, I am going to show you the questions and answers that you gave in that case. Can you read that (indicating)? Take this question:

“Q. What is the amount of Mr. Wentworth’s claim?

A. I don’t remember definitely; \$5,500 to \$5,700.”

Q. Did you make that answer to that question?

A. More than likely I did.

“Q. Do you know anything about the DuBois Lumber Company?

A. Yes, sir; \$202 or \$203.

Q. And the Columbia Digger Company?

A. They claim very closely to \$7,000.

Q. What was that for?

A. Rock on the street.

Q. Rock on the street. Had they served any notice on you as to the amount of their claim?

A. Yes, sir.

Q. When did you receive that paper, Mr. Sparks?

A. Just before the 20th of October. I don’t remember the exact date it was given me.

Q. Who gave it to you?

A. Mr. Hackett of the Columbia Digger Company.

Q. Do you know how much you expended in the completion of the street?

A. Very nearly \$3,300."

Q. Are those answers and questions correct?

A. They are.

I do not know how much bonds we received from the city and from this bank for and on account of the improvement of East B street after it was turned to us by Rector & Daly. I swore to the complaint in this case against the bank. I remember testifying in that case that there was a balance due, swore there was a balance due of \$11,633.98 in bonds. I found that out from my attorney, A. L. Miller. It is probably a fact that I received that amount from the city in bonds.

Q. Is it not a fact that you also received from Rector & Daly \$2,500 from Connecticut street?

A. I do not remember the amount.

Q. Well, did you not receive approximately that amount?

A. I do not know. I received the money; I do not know whether it was a considerable amount of money; I have not the books with me.

Q. If you were paid a large amount of money, you would certainly know—(interrupted)

MR. MILLER: Connecticut street had nothing to do with this.

MR. GILTNER: I will show that this went

towards East B street. I want to show the court that these people are not losing a dollar, and that they have discriminated against these people in favor of people in Vancouver, discriminated against the Columbia Digger Company; that they are not out a cent on this proposition; that they have not paid the Columbia Digger Company a cent on this proposition.

THE COURT: Proceed.

Q. Is it not a fact that it was about \$2,500 that you received from Rector & Daly on account of the improvement of Connecticut street?

A. The money was paid out on Connecticut street. There was no profit on that; we were bondsmen on that as well. It was a separate fund entirely.

Q. Now those were all of the debts of Rector & Daly, the Wentworth debt, and that \$203 debt, and about \$7,000 of the Columbia Digger Company, that Rector & Daly, or that you assumed and paid on account of the improvement of East B street. Is that not a fact?

A. No, sir.

Q. Except this \$3,000 you claim you paid out?

A. No, sir. I paid many other bills. I paid the Barber Asphalt people over \$1,000.00. I have not any books to show that. That went into the East B street improvement. It was for rock. That is not what I paid for the completion of it afterwards.

Rector & Daly bought \$1,000.00 worth of rock to go into East B street from the Barber Asphalt

people. I could not tell what else I paid; I have no books with me.

Q. Can you mention any other items besides that?

A. Not necessarily.

It is not a fact that Rector & Daly turned over to Sparks and Blurock a \$1,000.00 that belonged to the Barber Asphalt people; I am sure of it.

RE-DIRECT EXAMINATION.

I have stated that I received \$11,633.98 in bonds. There was a discount on those bonds. The Vancouver Trust & Savings Bank got the last bonds. They were turned over to the bank in the first place. We had some litigation over that. I think we got from the bank, in cash, as a result of that litigation, a discount of about 15% on the bonds. I do not know the exact amount. As a result of that decision, the bank got some of this money. I really have forgotten how much; several thousand dollars. We turned over to the bank out of that amount of money that counsel has been asking about, \$1,718.30. That went to the Vancouver Trust & Savings Bank; that was a part of the last bond issue.

The total amount of cash received was \$10,877, and of that amount \$1,718.00 was turned over to the bank, and the balance was used on the completion of the street. There are twenty or thirty small claims that have not yet been satisfied. I told you this morning of a large one; that was for asphalt used; something like \$3,000.00. I have not the bills

with me. These claims are in addition to the claim that the plaintiff is suing for here.

Q. Now, Mr. Sparks, you stated awhile ago, in answer to counsel's question, that you did not know anything about the arrangement between Mr. Hackett and Mr. Rector. What do you mean about that, as to the conversations you had with Mr. Hackett about it?

A. When he first came into the store, he introduced himself as Captain Hackett, and the other gentleman, Mr. Sewall, told me their business, and I asked them if Rector & Daly had not been making payments on this account, and they also handed me a bill showing a mixed bill for everything, to show where the payments had been made all down, and it was all made out of a fund of B street; they acknowledged that themselves, and later they said they had credited this on the sand and gravel account instead of the rock.

Q. In any of these conversations, did he give you the information, tell whether or not there was an understanding between him and Rector & Daly?

A. Yes; Mr. Hackett did.

RE-CROSS EXAMINATION.

Q. You stated finally, after having stated to me that you did not have any other bills to pay, except one or two small ones, in response to a question by Mr. Miller, that you had a big bill of three thousand dollars to the Barber Asphalt Co.?

A. I made no such statement.

Q. What did you state?

A. I said there was a bill presented for asphalt. I have not paid it and never intend to pay it; I do not owe it.

I cannot give the date of the conversations between myself, Mr. Hackett and Mr. Sewall in my store about which I was asked on direct examination. It was the year 1911; I think it was in the month of December. The improvement was not quite complete; I think not; I am not sure whether it was complete. They asked us what arrangements we expected to make for the payment of plaintiff's claim. Mr. Hackett told me they had credited their sand and gravel account, and expected to hold us for the rock.

The PLAINTIFF thereupon introduced the following evidence in rebuttal:

RUSSELL E. SEWALL, called as a witness on behalf of the PLAINTIFF, being duly sworn, testified as follows:

DIRECT EXAMINATION.

I heard the statement of Mr. Sparks here in regard to the conversation had with Mr. Hackett in Mr. Miller's office. I remember of being in Mr. Miller's office with Mr. Hackett. My recollection is, and I have looked up my letters to verify my recollection, that it was the latter part of July or the first of August, 1912. I was in the office or store of Mr. Blurock in 1911. I went over to the store one time with Mr. Hackett, the first time I went over to Vancouver. I have no memorandum of that visit,

but it was about the first of the year. I think it would be in January, 1912.

Q. Now, I wish you would state what the conversation was in the store between Mr. Hackett and Mr. Sparks in regard to this payment of money, the application of payments of money, and what conversation took place?

A. We demanded the payment of the balance that was due for crushed rock on B street. The conversation was regarding the payment of that account.

Q. What was said?

A. It was stated that they were in difficulties over the street, and over the collection of the bonds, and that Mr. Miller was his attorney, and that I would have to see him in regard to the matter.

Q. Did Mr. Hackett make any statement to him in regard to the application of moneys that he had received from Rector & Daly? You heard his statement here?

A. Yes, sir.

Q. Was there any claim made?

A. I cannot be positive about any conversation in the store at that time about the application of payments. I do not remember any particular conversation taking place in the store. We presented the balance due, and there was no contention made at that time. It was simply referred to his attorney.

Q. Coming up to this conversation which took place in Mr. Miller's office, what was said there?

A. That conversation took place after the set-

tlement of this lawsuit that Blurock and Sparks had brought against the bank. We had been waiting until that case was settled, upon the understanding that when they got their bonds off the street, they would make a settlement with us. Mr. Miller and Mr. Crass both submitted statements to me that the amount of the claims were \$12,850—(interrupted)

Q. What claims?

A. Claims against the street unpaid. They put in the Wentworth claim of six thousand, the Columbia Digger Company claim of sixty-six hundred, and small claims, two hundred and fifty dollars.

Q. State what the conversation was?

A. They also gave me figures they collected \$10,887, in bonds off B street and Connecticut \$2,500, totaling \$13,387. If Mr. Miller will look at these (indicating); I think they are Mr. Crass' figures.

Q. Were those figures made at the time?

A. Yes, sir.

Q. Now, Mr. Sewall, did Mr. Hackett at that time make any statement to Mr. Miller, or to anyone there, that they had applied moneys they had received from the improvement of B street on the sand and gravel account?

A. Mr. Miller asked Mr. Hackett if it was not a fact that he had received payments that he had applied to the sand and gravel account that should have been applied to the B street account, and Mr. Hackett told him that he had an agreement with Mr. Rector that all payments made should be credited to sand and gravel, and, in pursuance to that

agreement, they had made all payments upon the sand and gravel account.

Q. Was there any statement there made by Mr. Hackett that they had received any payments from the B street improvement?

A. None whatever; there could not have been such a thing as that. I was over there to collect the balance on the B street improvement, and it was the very gist of our claim, that it was not paid.

MR. MILLER: I object to that. That is an argument that can be made to the court later on.

THE COURT: Objection sustained.

Q. Was there any statement made to Mr. Sparks by Mr. Hackett when you visited the store, that they had applied any payments from the crushed rock on the sand and gravel?

A. No, sir.

CROSS EXAMINATION.

I am one of the attorneys for the plaintiff in this suit. I think you (Mr. Miller) and myself had two conversations about this matter.

Q. In one of these conversations, we discussed the law that we thought applicable to it, as I told you what I thought our Supreme Court held on the matter?

A. Yes; but I want to correct a statement you made before the court yesterday, that you had read an authority in my presence. You did not read me any authorities, nor did you cite me any authorities. It was what we call between lawyers "jaw-bone" law.

Q. Didn't I take down a volume of 30th (36th) Washington Reports down and read the decision to you?

A. What was the case?

Q. I do not know the name.

A. I do not think you read any law. I will tell you why I do not think so, because I asked you for your authorities, and you agreed to send them to me, and never did, and I verify that from my—(interrupted)

Q. And the very reason you brought this case in this court was to get away from that authority?

A. I say positively not. I went home, after you told me that there was lots of authority to the effect that, no matter whether we knew that the money came from B street, that you could trace around through the bank and show we finally got it. I came back and hunted for the decision and went in and found our Acme case, which does not hold anything of the kind.

Q. Didn't I read to you at that time a decision from the 36th Washington?

A. I do not remember it, and I do not believe you did, because I think I would have made a memorandum of it.

Q. In a later conversation, you said I misunderstood what you people said in the office that day about an agreement you had with Mr. Rector that you should apply all of the money which you had received from Rector & Daly instead of on the unsecured claims and let the secured claims take care

of themselves, or rather went back on the bondsmen for it, and we discussed that in my office that day?

A. We talked about the application of payments.

Q. And the agreement which Mr. Hackett claimed he had with Rector & Daly, or with Mr. Rector that he might do that?

A. Yes; that the payments might be made on the sand and gravel account.

Q. There was no question but that he had received money from B street that day?

A. Absolutely, I did not know five cents came from B street; neither did Mr. Hackett.

Q. Didn't you know they had been receiving payments as far the work progressed?

A. I know that the money all came from the bank, and those funds had been comingled there, and you could not show that any payments had come from B street.

Q. You never told me anything of that kind that day?

A. That is my recollection; that has been our contention from the very start.

Q. We had before us at that time the defendants' Exhibit No. 15?

A. I could not say; I do not believe I ever saw that before.

Q. You did not?

A. I have no recollection of it.

Q. We did not have that before us at that time?

A. I have no recollection of it.

Q. In this there was no question about the application of payments at all?

A. I do not remember of ever looking at any statements. I know I took no statements over. I knew there was a balance due on this rock and they furnished me the balance due, and I went over to see whether I could not collect it from you, according to the agreement.

Testimony Closed.

The following are all the exhibits received in evidence and are marked according to their identification marks when so received in evidence.

Plaintiff's Exhibit "A"

This is a copy duly certified by the City Clerk of the City of Vancouver, Washington, of a notice, and is as follows:

Portland, Oregon, October 17, 1911.

Messrs. M. R. Sparks, C. A. Blurock, J. P. Kiggins, Mayor, and J. P. Geoghegan, Clerk, of the City of Vancouver, Clarke County, State of Washington:
GENTLEMEN:

You are hereby notified that under and by virtue of a verbal contract entered into between Rector & Daly, contractors, for the improvement of East "B" street, in the City of Vancouver, Clarke County, Washington, and the Columbia Digger Co., a corporation of the State of Oregon, under and by the terms of which the Columbia Digger Co. has furnished to the said Rector & Daly crushed rock to the amount of \$8,415.00, there is due and owing at this time from said Rector & Daly to the said Columbia

Digger Co., the sum of \$6,693.68 for the said crushed rock which was used in the improvement of said "B" street, and that they have refused and failed to pay the same or any part thereof.

COLUMBIA DIGGER CO.,

By E. A. Hackett, Secretary.

Endorsed: Claim of Columbia

Digger Co. against East "B"

Street Improvement,

Filed October 17, 1911.

(Signed) JAS. P. GEOGHEGAN,

City Clerk.

Plaintiff's Exhibit "B"

ORDINANCE No. 485.

An Ordinance fixing the amount of the bond to be given by the contractor on public works in the City of Vancouver, Washington, for the purpose of protecting material men and laborers of such contractor.

THE CITY COUNCIL OF THE CITY OF VANCOUVER DO ORDAIN AS FOLLOWS:

Section 1. Whenever a contract to do any public work on any of the streets, public buildings or elsewhere in the city of Vancouver, Washington, is made and entered into with any person, firm or corporation, and the amount of such contract is more than the sum of \$300.00, such contractor shall make and execute and deliver to the City Council of the City of Vancouver, Washington, a good and sufficient bond with two or more sureties, or with a surety company authorized to do business in the State

of Washington, as surety, conditioned that such person, firm or corporation having such contract shall faithfully perform all of the provisions of such contract, and pay all laborers and mechanics and subcontractors and material men and all persons who shall supply such person or persons or said subcontractors with provisions and supplies for the carrying on of such work, all just debts, dues and demands incurred in the performance of such work, which bond shall be by said City Council filed with the City Clerk of said City of Vancouver, Washington.

Section 2. The bond mentioned in Section 1 of this act shall be given to the City of Vancouver, Washington, and shall be in an amount not less than 50% of the full contract price of any such improvement, and all persons mentioned in Section 1 of this act shall have a right of action in his, her or their own name or names on such bond for the full amount due from such contractor for work done by such laborers or mechanics and for materials furnished or provisions and goods supplied and furnished in the prosecution of such work or the making of such improvement.

Section 3. This ordinance shall be in force from and after its passage, approval by the Mayor, and publication according to law.

Read first and second times, July 7, 1909.

Read third time, July 19, 1909, and adopted by the following vote:

AYES: Councilmen Tenney, Duvoise, Greene,

Swan, McCarty and Rowley.

NAYS: None.

ABSENT: Buchanan.

Approved July 19, 1909.

(Signed) JOHN P. KIGGINS,

Mayor.

Attest:

(Signed) F. W. BIER,

City Clerk.

Plaintiff's Exhibit "C"

VANCOUVER TRUST AND SAVINGS BANK, VANCOUVER,
WASH. RECTOR & DALY.

Date	Items	Debits	Credits	Balance
1911	125			2423.68
	4			
		129.	49.40	2344.08
June 24	9c	1415.99		928.09
26	7c	616.70		311.39
26		3.55		307.84
27	7c	141.92		165.92
28	11c	1092.31	1009.85	83.46
29				
29	12c	786.56	1000.	296.90
30	16c	385.03		88.13
30			503.20	415.07
July 1	10c	267.83		147.24
3	46c	1015.64	1019.80	151.40
		49.25		
		522		
5	25c	713.83	569.25	6.82
6	23c	1334.61		1327.79
7	9c	40.41	2300.	931.80
8	5c	114.60		817.20

Date	Items	Debits	Credits	Balance
8			107.85	925.05
10	9c	28.24	64.50	961.31
10		3.		958.31
351 10	12c	939.	409.60	428.91
bal				
11		5.19		423.74
12	8c	126.59		297.15
13	10c	538.73	93.20	148.38
14	10c	522.29	7.50	663.17
15	7c	116.02	189.	590.19
17	61c	1872.24		
17	3c	103.		2565.43
		2089.40		
		23.30		
18		1618.05	2102.70	2080.78
		1298.84		
		530.70		
19	17c	399.33	1829.54	650.57
Bal. 20	8c 12.80	452.73	252.37	850.93
		107.73		
		231.40		
21	4c	42.90	351.93	541.90
22	14c	253.19		795.09
		548.20		
		198.91		
24	16c	224.78	747.11	272.76
24	5c	566.75-3	311.48	528.03
25	19c	227.74	442.56	313.21
25		6.02		319.23
26	7c	117.45-3	450.61	13.93
1911				13.93
July 27	9c	1980.54-2	1942.80	23.81
28	13c	461.31-2	384.10	101.02
		8c		

Date	Items	Debits	Credits	Balance
		2 deb.		
29	10c	2997.27		3098.29
31	4c	196.94-2	934.79	2360.44
		40.		
		18.50		
		17		
31		75.50		2435.94
		200		
		2660		
31			226.14	2209.00
Aug. 1	17c	190.88		2421.78
1	4c	21.90		2421.78
2	7c	70.35-3	4498.99	1993.14
2		19.89		2013.03
3	25c	748.97	224.45	2537.55
4	50c	966.17-2	386.59	3117.13
5	11c	187.96-3	119.29	3185.80
7	17c	308.04-2	126.04	3367.80
		Debit ck.		873.57
8	5c	1517.60-2	4011.83	
9	7c	89.30	213.50	749.37
9	4c	13.90		763.27
9		2.10		765.37
10	13c	1293.97	1397.41	661.93
11	9c	1307.80-3	1401.90	567.83
12	7c	66.70	501.95	132.58
14	11c	135.37	165.37	102.58
15	15c	1302.15		1404.73
16	14c	292.15	2047.84	350.96
17	27c	986.86-5	628.43	7.47
18			203.	195.53
18		-2	880.35	1075.88
18	Logging Camp		800.	1875.88
18	46c	1026.07		849.81

Date	Items	Debits	Credits	Balance
18	21 LC Cks.	770.95		78.86
19	4c	57.78		21.08
		28.47		
		2.15		
19		30.62		9.54
21	15c	270.99-2	278.86	1.67
		3.70		
		10.62		
21		14.32	150.	134.01
			200	
22	18c	366.70	48.87	16.18
23	14c	196.11	304.40	
23			26.08	150.55
1911	120.85			150.55
	.25			
Aug. 24		121.10		29.45
	3.			
24	8.25	11.25		18.20
24	223.20		121.25	139.45
	5.20			
25	12.47	240.87		
		83.		102.25
25		1.50		103.75
25		14.10		117.85
25			195.25	77.40
26	5c	77.20		.20
26		8.90	93.12	84.42
28	9c	96.68		12.26
28		19.50		31.76
29	5c	42.40		74.16
29			131.98	57.82
30	4c	32.15		25.67
30			166.65	
			43.25	235.57

Date	Items	Debits	Credits	Balance
31		12.90		222.67
31	4c	123.50		99.17
31		18.82		80.35
31			47.86	128.21
	25.			
Sept. 1		.90		
		38.74	25.90	137.86
		.40		
1		39.14	29.50	230.53
2	4c	61.14		161.39
5			1400.	
			244.50	
			98.42	
5	25c	548.96		1363.35
5	6c	137.		1226.35
5		24.30	28.63	1230.68
6	44c	956.10		274.58
6	4c	55.40		219.18
7	9c	45.07		174.11
7			184.77	
			17.	375.88
7		3000.	4000.	1375.88
8	4c	29.20	42.47	1346.68
8			14.	1403.15
8		81.57		1321.58
	10.			
9.	2.40	12.40		1309.18
9		3.25		1305.93
1911	5			1305.93
Sept. 9	2	12.		1293.93
	5			
9		2.52		1291.41
		18126.04		
		500	6567.12	

Date	Items	Debits	Credits	Balance
11		18626.04	11046.17	278.66
			257.51	
11			67.70	603.93
11	17c	247.99		355.94
12			413.10	769.04
12	9c	634.35		134.69
12		12.20		
		15.80	28.00	106.69
13		4.80		
		10.	14.80	132.85
13		17.95		206.79
13	Debit	200.		6.79
14	6c	101.74		94.95
14		265.		359.95
14			250.65	109.30
15	4c	90.52		199.82
16		2.12		201.94
18	16c	272.01		473.95
18	5c	84.66	134.25	424.36
18	28c	614.87		1039.23
18			1350.	310.77
19	14c	443.65	200.	67.12
		23.15		
		3.85		
19		27.00		40.12
	4.60			
	36.50			
19		41.10		.02
20	6c	141.40		142.38
		36.35		
20		14.86	51.21	193.59
	16.			
	12.			
21		28.		221.59

Date	Items	Debits	Credits	Balance
21			232.11	bal. 10.52
22		5.25		5.27
22		19.32		14.05
25	4c	12.65		26.70
25		3.		29.70
26	4c	61.30		91.00
27		2.40		93.40
Oct. 9			93.40	0.
14	1000		1022.	1022.
	22			
16		1022		0.

Plaintiff's Exhibit "D"

**VANCOUVER TRUST AND SAVINGS BANK, VANCOUVER,
WASH. RECTOR & DALY.**

Date	Items	Debits	Credits	Balance
Feb. 1			200.	200.
2			80.	280.
3	5	143.85		136.15
4	8	104.15		32.
6		3.40	107.50	136.10
7	3	61.21	107.	181.89
7	Int. on Daly	1.23		180.66
8		79.20		101.46
	5		31.50	132.96
	10.75			
	50			
9	25	92.55	38.75	79.16
	<hr/>			
	265			
10	1140	87.75	50.50	43.91
	20			
	<hr/>			
11	50	34.05		9.86
	1335			
14		63.35	23.10	30.39

Date	Items	Debits	Credits	Balance
			26.50	3.89
15	6	32.55	60.	23.56
16		69.30	245	226.26
			27	
17	11	287.10	185	124.15
18	10	101.25		22.91
20	11	219.49	145.15	51.42
21		4.		55.43
23	4	64.24		119.67
Bal. W			168.65	48.98
	21.95			
	9			
25		30.95	31.75	49.78
27	8	54.60		4.82
	3.95			
28	113.98	117.93	325.65	202.90
	4.40			
	29.65			
Mch. 1	43.20	77.25	146.20	271.85
2	6	255.10		16.75
		154.50		
		100.		
3		435.	254.50	163.75
w 4	23	254.76	168.05	250.46
6	10	97.62	334.50	13.58
7	14	334.44	34.75	313.27
		10.		
8		29.05	99.05	21.
		30.		391.32
9	13.75	14.75	414.82	8.75
	1			
		110.82		
		504.		
10		330.03	35.40	

Date	Items	Debits	Credits	Balance
11	6	115.66		401.54
	13.			
	490.			
13	9-23.25	131.70	526.25	6.99
	10			
	1.20			
14	28.50	40.20	23.95	23.24
	50			
15		70.30	53.50	40.04
16	5	119.50		159.54
17	19	396.	417.	138.54
18	14	173.55	602.89	290.80
20	8	139.90	48.	198.90
21	4	123.15	31.05	106.80
22	8	301.55		194.75
23		1.75	45.95	150.55n
		101.35		251.90
24	8.75			
	10.	18.75		270.65
25	6		752.40	481.75
	6	201.90		279.85
27	9	153.30		150.60
28	10	730.90		580.30
29	7	217.40	921.25	123.55
30		103.85		19.70
			40.	59.70
31		150.		90.30
	25.	27.75	371.75	215.30w
Apl. 1	2.75			
		125.		128.70 b
3	17	310.71		182.01
4	25	393.40	234.75	340.66
5		912.25	1023.95	228.96
6	9	86.55		315.51

Date	Items	Debits	Credits	Balance
7	4	80.80	87.15	309.16
8		10.		319.16
10			101.70	217.46
10	4	183.02	1046.50	646.02
11	12	121.57	25.	549.45
12	6	468.44	40.	121.02
13	8	227.18		106.17
14	309.68			
	288.90	598.58	209.15	495.60
15			329.45	825.05
Apr. 17	21	587.61	832.	580.66
18	130.50			
18	4.50	608.35	1500.	310.99
1911	11.80			
	2.80			
	22.04			310.99
19		37.64		273.35
20	9	728.74	67.50	387.89
21	7	195.	609.	26.11
22	9	133.89		107.78
24	3	1179.53	1219.	68.31
25	7	83.86	134.80	17.37
25		5		22.37
26	9 cks.	181.07	2557.	2353.56
27	5 "	2136.40	21.85	239.01
28	6 "	187.37		51.64
29	5.			
	7.53			
	.50	13.03	29.25	67.86
May 1	16c	2892.05	3549.45	725.26
2	21c	854.69		229.43
Bal. 3	13c	169.04	923.60	625.13
4	6c	595.40	85.95	115.68
5	6c	556.59	620.50	179.59

Date	Items	Debits	Credits	Balance
6	12c	156.70		22.89
8	7c	48.	1115.	13.96
8	2.88			
	3.50	6.33		20.29
8			67.15	46.86
9	6c	23.76	13.75	36.85
10	175.10			
	14.15	189.25	25.82	126.58
11	5c	685.31	1000.	188.11
12		33.	1109.36	1264.47
	10			
13	20	30.	163.20	1397.67
15		7.75	500.	1889.92
15	9			
	17.50			
	10.41	36.91		1853.01
16	8c	310.76		1542.25
16		19.21		1523.04
17	30c	1868.13	504.40	159.31
18	24c	577.34	500.	81.97
19	10c	495.39	500.	86.58
19			35.	121.58
20	6c	92.03	97.	126.55
22	7c	150.16	1214.	1190.39
23	6c	55.04		1135.35
25	10c	953.04		182.31
25	1.90			
	1.90	3.80		178.51
26	12.			
	10.			
	35.84	57.84		120.67
26		3265.83	3512.25	367.09
27	12c	93.46	14.10	287.73
27		42.87		244.86

Date	Items	Debits	Credits	Balance
29	9c	42.72		202.14
29		27.56		174.58
31	15	731.87	373.91	
31	7c	64.75		248.13
31			250.	Bal. 1.87
June 1	4c	43.80	50.	8.07
1		1.65		
		.95		
		.95	3.55	4.52
2	5c	57.25	193.70	140.97
3	11c -2D	304.18	1242.25	1079.04
		37.65		
5	44c 320.	940.02	413.40	552.42
		55.		
6	31c 5	1109.72	600.	42.70
		6252.55		
7	8c	6104.	6257.55	196.25
8	9c	1329.50	399.24	734.01
8		194.40	1420.40	491.99
9	16c	473.15		18.84
		35.55		
10	10c	221.31	399.65	197.18
12	11c 106.30	330.50	135.85	2.53
12		50.	84.71	37.24
13	8c	55.10	10.50	7.36
14	6c	118.47	3000.	2874.17 B
15	8c	2875.91		1.74
16	9c	202.26	1000.	796.
16	4c	504.55	1001.65	1293.10
17	21c	768.64		524.46
19	25c	6610.84	6552.31	465.93
19	4c	33.65	17.75	450.03
20	32c	729.65		279.62

Date	Items	Debits	Credits	Balance
	42.33			
20	2.	46.58	1477.12	1150.92
21	14c	237.66		913.26
21		29.10		884.16
22	11c	971.91	46.43	41.32
23	11c	4420.75-2	6885.75	2423.68

Defendant's Exhibit No. 1.

Rector & Daly, Vancouver, Wash., Aug 8, 1911,
No. 1859.

Pay to the order of Columbia Digger Co. \$1216.25
Twelve Hundred and Sixteen and 25/100 Dollars
To Vancouver Trust & Savings Bank, Vancouver,
Wash.

RECTOR & DALY.

7/5—483 y C Rock	603.75
7/6—490 “ “ “	612.50
	<hr/>
	1216.25

Defendant's Exhibit No. 2.

Rector & Daly, Vancouver, Wash., Oct. 10, 1911.
No. 2408.

Pay to the order of Columbia Digger Co. \$1000.00
One Thousand and 00/100 Dollars
To Vancouver Trust & Savings Bank, Vancouver,
Wash.

RECTOR & DALY.

Defendant's Exhibit No. 3.

Rector & Daly, Vancouver, Wash., July 10, 1911.

No. 1272.

Pay to the order of the Columbia Digger Co. \$649.25

Six Hundred Forty-nine and 25/100 Dollars.

To Vancouver Trust & Savings Bank, Vancouver,
Wash.

RECTOR & DALY.

530 yd. Rock at 1.25 662.50

Less 2% 15.25

649.25

Defendant's Exhibit No. 4.

Rector & Daly, Vancouver, Wash., July 17, 1911.

No. 1480.

Pay to the order of Columbia Digger Co. \$859.90

Eight Hundred Fifty-nine and 90/100 Dollars

To Vancouver Trust & Savings Bank, Vancouver,
Wash.

(On account)

RECTOR & DALY.

Defendant's Exhibit No. 5.

Rector & Daly, Vancouver, Wash., July 5, 1911.

No. 1242.

Pay to the order of Columbia Digger Co. \$1017.49

Ten Hundred Seventeen and 49/100 Dollars

To Vancouver Trust & Savings Bank, Vancouver,
Wash.

RECTOR & DALY.

5/22—389.6 yd. Rock

5/23—441. “ “

Defendant's Exhibit No. 6.

Rector & Daly, Vancouver, Wash., Sept. 6, 1911.
No. 2146.

Pay to the order of Columbia Digger Co. \$3000.00
Three Thousand and 00/000 Dollars
To Vancouver Trust & Savings Bank, Vancouver,
Wash.

(Ins. Funds.) RECTOR & DALY.

Defendant's Exhibit No. 7.

Rector & Daly, Vancouver, Wash., June 23, 1911.
No. 1101.

Pay to the order of Columbia Digger Co. \$501.64
Five Hundred One and 64/100 Dollars
To Vancouver Trust & Savings Co., Vancouver,
Wash.

409.5 yds. Crushed RECTOR & DALY.
Rock.

Less 2%.

Defendant's Exhibit No. 8.

To the Mayor and City Clerk
and City Treasurer and Common Council
of the City of Vancouver, Washington:—

YOU AND EACH OF YOU will please take notice that the undersigned who hold a contract with the City of Vancouver, Washington, for the improvement of East "B" Street therein, which contract was and is made pursuant to the terms and provisions of and by authority of Ordinance No. 533, which was adopted by the said City on the 15th day of Aug. 1910, and which was passed for

the purpose of creating and which did create improvement district No. 58, and which contract bears date the 6th day of May, 1911, have sold, assigned, transferred and set over to the Vancouver Trust & Savings Bank, all of the sums of money warrants, bonds or estimates due or to become due the undersigned under the terms and provisions of said contract.

AND YOU AND EACH OF YOU are hereby directed to pay and deliver to the order of the Vancouver Trust & Savings Bank, all the sum or sums of money, cash or warrants or bonds and estimates for the principal sum, or the interest thereon due or to become due the aforesaid Rector & Daly under the terms of said contract, and in the manner as in said contract provided, which is by you received, as aforesaid, for any and all, in whole or part payment of assessments made against any and all property in said improvement district No. 58, or abutting on said East "B" Street, between the points to be improved, and this order is to notify you and each of you that the same is to continue until the further order of the Vancouver Trust & Savings Bank, with reference to any settlement or assessments paid or to be paid, and until all assessments on said East "B" street, and in said improvement district No. 58, arising by reason of said improvement, are paid in full, with the principal and interest thereon, and the production of evidence by you of having delivered the cash or money or warrants or bonds to the said Vancouver

Trust & Savings Bank, in payment of the obligation of said improvement district for the said improvement, so made by us, shall be conclusive evidence of your discharge on said contract obligation, so far as we are concerned.

Dated at Vancouver, Washington this 7th
day of June, 1911.

(Rector and Daly RECTOR & DALY,
Transfer of By A. B. Rector, Mag.
payment—East "B" Street
to
Vancouver Trust Savings Bank

FILED

June 7th, 1911,

Jas. P. Geoghegan,
City Clerk.)

Defendant's Exhibit No. 9.

Vancouver, Washington, Aug. 8, 1911.

The Treasurer of the City of Vancouver will pay to Rector and Daly (assigned to Vancouver Trust & Savings Bank) or order, the sum of Ten Thousand Forty-six and 17/100 Dollars out of the Improvement Dist. No. 58 Fund; allowed by the City Council Aug. 7, 1911. For cash paid into East "B" St. Assignment. \$10,046.17

Attest: Jas. P. Geoghegan,
City Clerk.

JOHN P. KIGGIN,
Mayor.

Defendant's Exhibit No. 10.

City of Vancouver, Washington,
Office of City Clerk.

Vancouver, Wash.

August 9th, 1911.

Received of Jas. P. Geoghegan, City Clerk, Bonds No. 1 and 2 of Local Improvement District No. 58, East "B" Street in amount of \$500.00 each total \$1000.00.

VANCOUVER TRUST & SAVINGS BANK,

By Milton Evans,
a Cashier.

Defendant's Exhibit No. 11.

City of Vancouver, Washington,
Office of City Clerk.

Vancouver, Wash.

September 7th, 1911.

Received of Jas. P. Geoghegan, City Clerk, Bonds of Local Improvement District No. 58, East B Street, Numbers 3 to 17 inclusive, amounting to \$7,500.00.

VANCOUVER TRUST & SAVINGS BANK,

Milton Evans,
a Cashier.

Defendant's Exhibit No. 12.

City of Vancouver, Washington,
Office of City Clerk.

Vancouver, Wash.

October 7th, 1911.

Received of Jas. P. Geoghegan, City Clerk, Bonds

numbered 18 to 23 inclusive, in denomination of \$500.00 each, amounting to \$3,000.00.

VANCOUVER TRUST & SAVINGS BANK,
By Milton Evans,
a Cashier.

Defendant's Exhibit No. 13.

\$4000.00 Vancouver, Washington, Sept. 7, 1911.

ON DEMAND after date, without grace, for value received, I promise to pay to the order of VANCOUVER TRUST AND SAVINGS BANK, of Vancouver, Washington,

FOUR THOUSAND AND NO/100 DOLLARS

in gold coin of the United States of America, with interest at 8 per cent per annum from date until maturity, and one per cent per month from maturity until paid, payable quarterly, and if any part of this note or interest be not paid when due, it shall cause the whole to become due and payable at once, without further notice, and I agree to pay Ten Dollars as fees for collecting the same, provided the same is placed in the hands of an attorney for collection and is collected by such attorney, without suit or action, but in case suit or action shall be brought to collect principal or interest, I promise to pay such additional sum as the Court shall adjudge reasonable as attorney's fees in said suit or action, which fee shall be taxed as part of the costs in the judgment recovered. The makers, endorsers and guarantors of this note hereby severally waive presentment for payment, notice of non-payment, protest and notice of protest and diligence in

bringing suit against any parties thereto, and sureties consent that the time of payment may be extended from time to time without notice thereof.

P. O. Address..... RECTOR & DALY,
No. 1023. Due..... By A. B. Rector.

(On the back of above note.)

For value received I hereby guarantee the payment of the principal of within note, and the interest and attorney's fees therein provided for, at maturity; and at any time thereafter, until paid, and I hereby waive demand of payment, presentation for payment, notice of non-payment and notice of protest.

B VANCOUVER TRUST & SAVINGS BANK

By E. F. Bonton, Pres.

Endorsement on		Balance due on
Principal		Principal
Sept. 13-11	\$200.00	\$3800.00
October 7-11	1166.60	2633.40
July 30, 1912	503.80	2129.60

Defendant's Exhibit No. 14.

Vancouver, Wash., April 1st, 1911.

The City of Vancouver

To Rector & Daly, Contractors, Dr.

To work done on Improvement Dist. No. 58

(E. "B" St.) during month of March, 1911 \$1270.00

O. K.

H. H. Lotter, C. E.,

City Engineer.

CLAIM OF

Rector & Daly, Contractors,
\$1270.00

For work done on Imp. Dist. No.58
during month of March, 1911.

OnFUND

I hereby certify that the within
claim is correct and just.

JOHN RANSCH

Filed Apr. 3, 1911.

Jas. P. Geoghegan,
City Clerk,

Audited and Allowed.....
.....19.....for \$.....

by the Committee on Accounts and
Current Expenses.

W. TENNY,
Chairman.

Vancouver, Washi, Dec. 1, 1911.

THE CITY OF VANCOUVER

To Rector & Daly——Dr.

or their successors or assigns.

To final payment on Imp. Dist. No. 58 (E. "B" St.) :
\$8732.35

Total work done.....\$33180.15

Vouchers issued before..... 2447.80

Balance due\$8732.35

An amt. sufficient to make needed repairs
should be withheld for a month or two until
final acceptance.

O. K. H. H. Lotter, C. E.

City Engineer.

CLAIM OF

Rector & Daly, their successors or assigns.

\$8732.35

For final payment on Dist. No. 58 (E. "B" St.)

OnFUND

I hereby certify that the within claim is correct and just.

Filed Dec. 4, 1911.

Jas. P. Geoghegan, City Clerk.

Vancouver, Wash. Nov. 1911

THE CITY OF VANCOUVER

To Rector & Daly-----Dr.

To work done on Imp. Dist. No. 58 (E. "B" St.)
during Oct. 1911 2108.00

O. K. H. H. Lotter, C. E.

City Engineer.

CLAIM OF

RECTOR & DALY

\$2108.00

For work done on Imp. dist. No. 58 (E. "B" St.)
during Oct. 1911.

OnFUND

I hereby certify that the within claim is correct and just.

JOHN RANSCH.

Filed November 6, 1911,

Jas. P. Goeghegan,

City Clerk.

Audited and allowed.....191.....for \$.....

By the Committee on Accounts and Current Expenses.

J. G. WINTERS,
Chairman.

Vancouver, Wash., Oct. 2nd, 1911.

The City of Vancouver,

To Rector & Daly—————Dr.

To work done on E. "B" St. Dist. No. 58 during mo.
of Sept. 1911. \$3255.97

Total amount vouchered to date..\$22339.80

O. K. H. H. Lotter, C. E.

City Eng.

(On the back of claim.)

(BONDS)

Claim of

Rector & Daly

\$3255.97

For work on E. "B" St. Imp. Dist. No. 58 done during Sept. 1911.

OnFUND. I hereby certify that the within claim is correct and just.

W. TENNEY,

Filed Oct. 2, 1911, Jas. P. Geoghegan, City Clerk.

Audited and allowed Oct. 2, 1911, by the Committee on Accounts and Current Expenses.

W. TENNEY,
Chairman.

Vancouver, Wash., Sept. 1st, 1911.

THE CITY OF VANCOUVER,

To Rector & Daly—————Dr.

To work done on Imp. Dist. No. 58 (E. "B" St.)
during August, 1911. \$7713.83

O. K., H. H. Lotter, C. E.,
City Engineer.

Total vouchers to date \$19083.83.

(On the back of claim.)

CLAIM OF
RECTOR & DALY

\$7713.83

For work done Imp. Dist. No. 58
(E. "B" St.) during August, 1911.

OnFUND

I hereby certify that the within
claim is correct and just.

JOHN RANSCH.

Filed Sept. 4, 1911.

Jas. P. Goeghegan,
City Clerk.

Audited and allowed (BONDS)

.....191.....for \$7713.83

by the Committee on Accounts and
Current Expenses.

W. TENNEY, Chairman

Vancouver, Wash. Aug. 1st, 1911.

THE CITY OF VANCOUVER

To Rector & Daly, Contractors, Dr.

To work done during July, 1911, on Imp.
Dist. No. 58 (E. "B" St.) \$3300.00

Amt. total vouchers to date including this one

\$11370.00

Work done up to Aug. 1st, 1911	14,206.55
20%	2,841.31

Bal.	11,365.24
------	-----------

O. K H. H. Lotter, C. E.,
City Engineer.

Total 11,370.00

Cash 10,046.17

Bonds 1,000.00

11,046.17	11,046.17
-----------	-----------

323.83

(On the back of claim)

CLAIM OF RECTOR & DALY, CONTRACTORS
\$3300.00

For work done on E. "B" St. Ipm. Dist. No. 58 dur-
ing July, 1911

on FUND

I hereby certify that the within claim is correct and
just.

JOHN RANSCH.

Filed Aug. 7, 1911.

Jas. P. Geoghegan, City Clerk.

Audited and allowed (Pay in Bonds)

by the Committee on Accounts and Current Expense.

W. TENNEY, Chairman.

Vancouver, Wash., May 1st, 1911.

THE CITY OF VANCOUVER

To Rector & Daly, Contractors, Dr.

To work done on E. "B" St. Imp.

Dist. No. 58, during month of
 April, 1911\$2000.00
 Work done to May 1st....\$3347.59
 “ “ “ April 1st.... 1270.00

 “ “ “ May 2077.59

O. K. H. H. Lotter, C. E.,
 City Engineer.

CLAIM OF
 Rector & Daly, Contractors,
 \$2000.00

For work done on E. “B” St. Imp.
 Dist. No. 58, during April 1911.
 OnFund
 I hereby certify that the within
 claim is correct and just.

JOHN RANSCH.

Filed May 1, 1911.

JAS. P. GOEGHEGAN,
 City Clerk.

Audited and allowed.....
19.....for \$.....
 by the Committee on Accounts and
 Current Expenses.

W. TENNEY, Chairman.

Vancouver, Wash, July 1, 1911.

THE CITY OF VANCOUVER

To Rector & Daly, Contractors, Dr.
 For work done on Imp. Dist. No. 58, E. “B” St.
 during the month of June, 1911 \$2300.00
 Vouchers to June 1st, incl. \$5770.00

Amount of this voucher.. 2300.00

Total to date\$8070.00

O. K H. H. Lotter, C. E.,
City Engineer.

CLAIM OF
Rector & Daly, Contractors,
\$2300.00

For work done during June, 1911
on Imp. Dist. No. 58, E. "B" St.
onFund
I hereby certify that the with-
in claim is correct and just.

JOHN RANSCH.

Filed July 3, 1911,
Jas. P. Geoghegan,
City Clerk.

Audited and allowed.....191..
for \$.....by the Com-
mittee on Accounts and Current
Expenses.

JOHN G. WINTERS, Chairman.

(Paid by Bond)

Vancouver, Wash., June 5th, 1911.

THE CITY OF VANCOUVER

To Rector & Daly, Contractors, Dr.
To work done on E. "B" St. Imp. Dist. No. 58,
during month of May, 1911, \$2500.00
Total to date:

Voucher of Apr. 1st..... 1270.00

“ “ May 1st..... 2000.00

Columbia Digger Company vs.

“ “ June 1st..... 2500.00

Total..... 5770.00

O. K. H. H. Lotter, C. E.,
City Engineer.

CLAIM OF
Rector & Daly, Contractors,
\$2500.00

For work done on Imp. Dist.
No. 58 E. “B” St. month of May,
1911.

OnFund

I hereby certify that the within
claim is correct and just.

JOHN RANSCH.

Filed June 5, 1911,

Jas. P. Geoghegan,
City Clerk.

Audited and allowed.....
19....for.....by the Com-
mittee on Accounts and Current
Expenses.

W. TENNEY,
Chairman.

Plaintiff’s Exhibit No. 15.

STATEMENT.

Portland, Oregon, Dec. 30, 1911.

RECTOR & DALY,
Vancouver, Wn.,
in account with

COLUMBIA DIGGER COMPANY.

Phones: A 1997

Main 997 ANKENY STREET DOCK

1911	Balance		
May 11	Bill Rendered	216.60	
12	"	293.60	
22	"	240.10	
"		By Check	240.10
June 13	"	501.64	
14	"	12.50	
19		" "	501.64
21	"	477.26	
22		" Cr. Memo	16.25
"		" Check	157.75
"	"	266.40	
23	"	540.23	
26		" "	1017.49
		<hr/>	
		2548.33	1933.23
	Balance Forward		615.10

STATEMENT.

Portland, Oregon, Dec. 30, 1911.

Rector & Daly,

Vancouver, Wn.,

in account with

COLUMBIA DIGGER COMPANY

Phones: A 1997

Ankeny Street Dock

Main 977

(Sand and Gravel Ap.)

1911

June 26 Balance 615.10

	29	Bill Rendered	244.80	
	"	By Check & Discount		662.50
July	8	"	321.60	
	8	"	281.60	
	9	"	202.20	
	9	"	538.00	
	11	"	379.65	
	11	"	211.00	
	12	By Check		300.00
	15	" "		859.90
	17	Bill Rendered	501.60	
	18	"	552.50	
	30	"	284.00	
Aug.	3	By Check		1216.25
	10	Bill Rendered	282.40	
	11	"	189.50	
	15	By Cr. Memo.		40.80
	16	Bill Rendered	272.80	
	17	"	214.00	
	19	"	277.60	
	27	"	269.60	
	28	By check dated and payable Sept. 3		3000.00
	29	Bill Rendered	186.00	
	31	"	472.40	
Sept.	6	"	322.40	
	10	"	299.00	
	12	"	3.00	
	20	"	250.40	
	21	"	200.00	
	27	"	264.80	

		<i>M. R. Sparks and G. A. Blurock.</i>	183
	“	By Discount	5.00
	“	“ Check	250.00
Oct.	2	Bill Rendered	180.00
	4	By Discount	3.60
	4	“ Check	176.40
	11	“ “	1000.00
	30	“ “	450.00
Dec.	1	“ Cr. Memo.	10.20.
			<hr/>
			7815.95 7974.65
Balance Cr. to Cr. Rock Ap.			158.70
			<hr/>
			7974.65 7974.65

STATEMENT.

Portland, Oregon, Nov. 1, 1911.

RECTOR & DALY,

Crushed Rock Ap.

Vancouver, Wn.,

in account with

COLUMBIA DIGGER COMPANY

Phones: A. 1997

Ankeny Street Dock

Main 997

Oct.	1	Balance	7693.68
“	11	By Cash	1000.00
			<hr/>

6693.68

Plaintiff's Exhibit No. 16.

STATEMENT

Portland, Oregon, Dec. 30, 1911.

Rector & Daly,

Vancouver, Wash.

Crushed Rock Ap. as used on "B" Street
in account with

COLUMBIA DIGGER COMPANY

Phones: A. 1997

Ankeny Street Dock

Main 997

1911

Balance			
June 25	Bill Rendered 530.0 yds. at 1.25	662.50	
July 5	973.0 "	1216.25	
Aug. 1	478.7 "	598.38	
10	401.0 "	501.25	
22	380.0 "	475.00	
23	445.6 "	557.00	
29	336.0 "	420.00	
Sept. 2	384.0 "	480.00	
4	370.0 "	462.50	
24	401.4 "	501.75	
26	402.0 "	502.50	
27	380.2 "	475.25	
		<hr/>	6852.38
Balance from Sand and Gravel Acc.			158.70
		<hr/>	6693.68

Before the court had made its findings of fact and conclusions of law and its final decision herein, the plaintiff duly requested the court to make each of the following findings of fact, numbered from II to XXXIX, both inclusive, and each of the following conclusions of law from I to VI, both inclusive, and the court separately refused to find each one of said findings of fact and conclusions of law,

and to each refusal of the court to make said findings of fact and conclusions of law, the plaintiff separately excepted and the court allowed a separate exception to each refusal of the court to find as aforesaid.

Findings of Fact.

I.

That the defendants, Rector & Daly, have paid the plaintiff upon account of their claim for crushed rock the sum of \$662.50, the same being paid by check for \$649.25 and by discount allowed the plaintiff of the sum of \$13.25.

II.

That said Rector & Daly have made no other payments on account of the plaintiff's claim.

III.

That the balance due plaintiff from said Rector & Daly on account of said crushed rock at the time of the commencement of this action was the sum of \$6,189.88.

IV.

That the payment of \$1,017.49 made by said Rector & Daly to the plaintiff by check dated July 5, 1911, upon the Vancouver Trust & Savings Bank was made out of moneys to their credit in said bank, and that said payment was not applied by said Rector & Daly upon their indebtedness to plaintiff for said crushed rock, but was applied by plaintiff with the consent of said Rector & Daly upon the indebtedness of said Rector & Daly to

said plaintiff on account of the indebtedness of said Rector & Daly to said plaintiff for sand and gravel sold and delivered by plaintiff to said Rector & Daly.

V.

That the said account, out of which said check was paid, was the general checking account of said Rector & Daly in said bank, in which said Rector & Daly from time to time made deposits in the general course of their business, and that some of their said deposits in said account were the proceeds of notes given by them to said bank and discounted by said bank and placed to their credit in said account.

VI.

That the note for \$2,300.00 discounted by said bank in connection with the payment of said check for \$1,017.49 was not given by said Rector & Daly or discounted by said bank against the moneys to be paid from said city to said Rector & Daly on account of the improvement of East "B" street.

VII.

That said check for \$1,017.49 was not paid by said bank out of any moneys received by said Rector & Daly from said city on account of the improvement of said street "B."

VIII.

That the plaintiff had no knowledge that the said check for \$1,017.49 was paid or to be paid out of any moneys received by Rector & Daly from the said city or derived in any manner from, or having any connection with, the said improvement

of street "B," and had no knowledge or notice of any equity of the defendants, Sparks & Blurock, as sureties to have the said money applied upon the account for crushed rock.

IX.

That the payment of \$1,216.25 made by said Rector & Daly to the plaintiff by check dated August 8, 1911, upon the Vancouver Trust & Savings Bank was made out of moneys to their credit in said bank, and that said payment was not applied by said Rector & Daly upon their indebtedness to plaintiff for said crushed rock, but was applied by plaintiff with the consent of said Rector & Daly upon the indebtedness of said Rector & Daly to said plaintiff on account of the indebtedness of said Rector & Daly to said plaintiff for sand and gravel sold and delivered by plaintiff to said Rector & Daly.

X.

That the said account, out of which said check was paid, was the general checking account of said Rector & Daly in said bank, in which said Rector & Daly from time to time made deposits in the general course of their business, and that some of their said deposits in said account were the proceeds of notes given by them to said bank and discounted by said bank and placed to their credit in said account.

XI.

That the note for \$1,306.00 discounted by said bank in connection with the payment of said check

for \$1,216.25 was not given by said Rector & Daly or discounted by said bank against the moneys to be paid from said city to said Rector & Daly on account of the improvement of East "B" street.

XII.

That said check for \$1,216.25 was not paid by said bank out of any moneys received by said Rector & Daly from said city on account of the improvement of said street "B."

XIII.

That the plaintiff had no knowledge that the said check for \$1,216.25 was paid or to be paid out of any moneys received by Rector & Daly from the said city or derived in any manner from, or having any connection with, the said improvement of street "B," and had no knowledge or notice of any equity of the defendants, Sparks & Blurock, as sureties to have the said money applied upon the account for crushed rock.

XIV.

That the payment of \$3,000.00 made by Rector & Daly to the plaintiff by check dated September 6, 1911, upon the Vancouver Trust & Savings Bank was made out of moneys to their credit in said bank, and that said payment was not applied by said Rector & Daly upon their indebtedness to plaintiff for said crushed rock, but was applied by plaintiff with the consent of said Rector & Daly upon the indebtedness of said Rector & Daly to said plaintiff on account of the indebtedness of said Rector &

Daly to said plaintiff for sand and gravel sold and delivered by plaintiff to said Rector & Daly.

XV.

That the said account, out of which said check was paid, was the general checking account of said Rector & Daly in said bank, in which said Rector & Daly from time to time made deposits in the general course of their business, and that some of their said deposits in said account were the proceeds of notes given by them to said bank and discounted by said bank and placed to their credit in said account.

XVI.

That the note for \$4,000.00 discounted by said bank in connection with the payment of said check for \$3,000.00 was not given by said Rector & Daly or discounted by said bank against the moneys to be paid from said city to said Rector & Daly on account of the improvement of East "B" street.

XVII.

That said check for \$3,000.00 was not paid by said bank out of any moneys received by said Rector & Daly from said city on account of the improvement of said street "B."

XVIII.

That the plaintiff had no knowledge that the said check for \$3,000.00 was paid or to be paid out of any moneys received by Rector & Daly from the said city or derived in any manner from, or having any connection with, the said improvement of street "B," and had no knowledge or notice of any equity

of the defendants, Sparks and Blurock, as sureties to have the said money applied upon the account for crushed rock.

XIX.

That the payment of \$859.90 made by said Rector & Daly to the plaintiff by check dated July 11, 1911, upon the Vancouver Trust & Savings Bank was made out of moneys to their credit in said bank, and that said payment was not applied by said Rector & Daly upon their indebtedness to plaintiff for said crushed rock, but was applied by plaintiff with the consent of said Rector & Daly upon the indebtedness of said Rector & Daly to said plaintiff on account of the indebtedness of said Rector & Daly to said plaintiff for sand and gravel sold and delivered by plaintiff to said Rector & Daly.

XX.

That the said account, out of which said check was paid, was the general checking account of said Rector & Daly in said bank, in which said Rector & Daly from time to time made deposits in the general course of their business, and that some of their said deposits in said account were the proceeds of notes given by them to said bank and discounted by said bank and placed to their credit in said account.

XXI.

That the note for \$2,079.40 discounted by said bank in connection with the payment of said check for \$859.90 was not given by said Rector & Daly or discounted by said bank against the moneys to

be paid from said city to said Rector & Daly on account of the improvement of East "B" street.

XXII.

That said check for \$859.90 was not paid by said bank out of any moneys received by said Rector & Daly from said city on account of the improvement of said street "B."

XXIII.

That the plaintiff had no knowledge that the said check for \$859.90 was paid or to be paid out of any moneys received by Rector & Daly from the said city or derived in any manner from, or having any connection with, the said improvement of street "B," and had no knowledge or any notice of any equity of the defendants, Sparks and Blurock, as sureties to have the said money applied upon the account for crushed rock.

XXIV.

That the payment of \$501.64 made by said Rector & Daly to the plaintiff by check dated June 23, 1911, upon the Vancouver Trust & Savings Bank was made out of moneys to their credit in said bank, and that said payment was not applied by said Rector & Daly upon their indebtedness to plaintiff for said crushed rock, but was applied by plaintiff with the consent of said Rector & Daly upon the indebtedness of said Rector & Daly to said plaintiff on account of the indebtedness of said Rector & Daly to said plaintiff for sand and gravel sold and delivered by plaintiff to said Rector & Daly.

XXV.

That the said account, out of which said check was paid, was the general checking account of said Rector & Daly in said bank, in which said Rector & Daly from time to time made deposits in the general course of their business, and that some of their said deposits in said account were the proceeds of notes given by them to said bank and discounted by said bank and placed to their credit in said account.

XXVI.

That the note for \$5,770.00 discounted by said bank in connection with the payment of said check for \$501.64 was not given by said Rector & Daly or discounted by said bank against the moneys to be paid from said city to said Rector & Daly on account of the improvement of East "B" street.

XXVII.

That said check for \$501.64 was not paid by said bank out of any moneys received by said Rector & Daly from said city on account of the improvement of said street "B."

XXVIII.

That the plaintiff had no knowledge that the said check for \$501.64 was paid or to be paid out of any moneys received by Rector & Daly from the said city or derived in any manner from, or having any connection with, the said improvement of street "B," and had no knowledge or notice of any equity of the defendants, Sparks and Blurock, as sureties to

have the said money applied upon the account for crushed rock.

XXIX.

That the payment of \$1,000.00 made by said Rector & Daly to the plaintiff by check dated October 10, 1911, upon the Vancouver Trust & Savings Bank was made out of moneys to their credit in said bank, and that said payment was not applied by said Rector & Daly upon their indebtedness to plaintiff for said crushed rock, but was applied by plaintiff with the consent of said Rector & Daly upon the indebtedness of said Rector & Daly to said plaintiff on account of the indebtedness of said Rector & Daly to said plaintiff for sand and gravel sold and delivered by plaintiff to said Rector & Daly.

XXX.

That the said account, out of which said check was paid, was the general checking account of said Rector & Daly in said bank, in which said Rector & Daly from time to time made deposits in the general course of their business, and that some of their said deposits in said account were the proceeds of notes given by them to said bank and discounted by said bank and placed to their credit in said account.

XXXI.

That the note for \$1,022.00 discounted by said bank in connection with the payment of said check for \$1,000.00 was not given by said Rector & Daly or discounted by said bank against the moneys to

be paid from said city to said Rector & Daly on account of the improvement of East "B" street.

XXXII.

That said check for \$1,000.00 was not paid by said bank out of any moneys received by said Rector & Daly from said city on account of the improvement of said street "B."

XXXIII.

That the plaintiff had no knowledge that the said check for \$1,000.00 was paid or to be paid out of any moneys received by Rector & Daly from the said city or derived in any manner from, or having any connection with, the said improvement of street "B," and had no knowledge or notice of any equity of the defendants, Sparks and Blurock, as sureties to have the said money applied upon the account for crushed rock.

XXXIV.

There is no competent evidence to show that the check for \$1,017.49 was paid out of moneys received by Rector & Daly from or on account of said street improvement "B," or in any manner derived therefrom or having any connection therewith.

XXXV.

There is no competent evidence to show that the check for \$1,216.00 was paid out of moneys received by Rector & Daly from or on account of said street improvement "B," or in any manner derived therefrom or having any connection therewith.

XXXVI.

There is no competent evidence to show that the

check for \$3,000.00 was paid out of moneys received by Rector & Daly from or on account of said street improvement "B," or in any manner derived therefrom or having any connection therewith.

XXXVII.

There is no competent evidence to show that the check for \$1,000.00 was paid out of moneys received by Rector & Daly from or on account of said street improvement "B," or in any manner derived therefrom or having any connection therewith.

XXXVIII.

There is no competent evidence to show that the check for \$859.90 was paid out of moneys received by Rector & Daly from or on account of said street improvement "B," or in any manner derived therefrom or having any connection therewith.

XXXIX.

There is no competent evidence to show that the check for \$501.64 was paid out of moneys received by Rector & Daly from or on account of said street improvement "B," or in any manner derived therefrom or having any connection therewith.

Conclusions of Law.

I.

That the application of the payments represented by the six checks set forth in these proposed findings by the plaintiff with the consent of Rector & Daly to the indebtedness of Rector & Daly to the plaintiff for sand and gravel was a lawful application of said payments and binding upon the defendants,

Sparks and Blurock, without any reference to the source from which said moneys came, and without any reference to the knowledge of the plaintiff of the source from which said moneys came.

II.

The defendants, Sparks & Blurock, have no right to set aside the application of payments made by the plaintiff with the consent of said Rector & Daly.

III.

That the defendants, Sparks & Blurock, have no right to challenge the application of said payments by the plaintiff with the consent of Rector & Daly without proving that the moneys used in making such payments was moneys derived by Rector & Daly under their contract with the city for the improvement of East "B" street, and without also proving that the plaintiff knew at the time said payments were so applied that the moneys with which said payments were made were received by said Rector & Daly under said contract for the improvement of East "B" street.

IV.

That the answer does not allege that plaintiff had knowledge that the moneys so applied were received by said Rector & Daly under said contract for the improvement of East "B" street, and that, therefore, no finding of knowledge can be made by the court under the pleadings.

V.

That the burden is upon the said defendants, Sparks & Blurock, to clearly trace the moneys which

said Sparks & Blurock seek to have applied upon the indebtedness to plaintiff, but said Sparks and Blurock have no right to insist upon the application of said payments upon the indebtedness for crushed rock.

VI.

That said defendants have no right in an action at law to set aside said application of payments, but that their only remedy, if any, is in a court of equity.

Before the court made its findings herein, the plaintiff duly objected to the court's making the eleventh finding of fact proposed by the defendant, and also to the court's making said finding, on the ground and for the reason that the moneys paid by said checks were not realized from the improvement of said East "B" street, and were not the same moneys for the collection and payment of which the defendants, Sparks and Blurock, were sureties. The said objection was overruled and the court made the eleventh proposed finding, to which action of the court plaintiff duly excepted, and said exception was duly allowed by the court.

The foregoing bill of exceptions contains all of the testimony, evidence and exhibits received upon the trial of this action, and all the objections made, rulings of the court and exceptions of the plaintiff, and all of the requests of the plaintiff for findings of fact and rulings upon questions of law with the rulings of the court upon said requests and the exceptions allowed to plaintiff and the objections of

the plaintiff to the proposed findings of defendants and the ruling of the court thereon, and the exception of plaintiff to said ruling.

And plaintiff prays that this, its bill of exceptions, may be allowed, settled and signed by the Judge who tried this action.

The foregoing bill of exceptions was duly presented for settlement within the time for settlement thereof, as fixed by order of the court, based upon the stipulations of the parties, and said bill of exceptions being in conformity with the truth, the said foregoing matter is hereby allowed, settled and signed as and for the bill of exceptions in this case this 10th day of November, 1914, in open court, and the same is hereby made a part of the record herein. Said bill of exceptions contains all the testimony, evidence and exhibits in the case.

EDWARD E. CUSHMAN,

United States District Judge

For the District of Washington.

(Duly filed).

Assignment of Errors.

Comes now the plaintiff by Giltner & Sewall and Guy C. H. Corliss, its attorneys, and says that in the records and proceedings in the above entitled action there is manifest error, and said plaintiff now files the following Assignment of Errors, upon which it will rely on the prosecution of the writ of error in the above entitled cause.

I.

The Court erred in overruling plaintiff's objection to Defendants' Exhibit No. 8, and in receiving said exhibit in evidence.

II.

The Court erred in overruling plaintiff's objection the following question asked the witness, A. B. Rector, on cross examination:

"Q. Doesn't it appear from your own books that you were receiving crushed rock from these people on the 9th of October?"

III.

The Court erred in overruling plaintiff's objection to Defendants' Exhibit No. 9, and in receiving said exhibit in evidence.

IV.

The Court erred in overruling plaintiff's objection to Defendants' Exhibit No. 10, and in receiving the same in evidence.

V.

The Court erred in overruling plaintiff's objection to Defendants' Exhibit No. 11, and in receiving the same in evidence.

VI.

The Court erred in denying plaintiff's motion to strike out as follows:

"I move to strike out all of that testimony in regard to the application—the testimony given with regard to the security for these notes and the application of the moneys, derived from different sources for the payment of these notes, because the testi-

mony is hearsay, and he is not able to testify of his own knowledge of any particular item, except what he was told."

VII.

The Court erred in refusing to make plaintiff's second proposed finding of fact.

VIII.

The Court erred in refusing to make plaintiff's third proposed finding of fact.

IX.

The Court erred in refusing to make plaintiff's fourth proposed finding of fact.

X.

The Court erred in refusing to make plaintiff's fifth proposed finding of fact.

XI.

The Court erred in refusing to make plaintiff's sixth proposed finding of fact.

XII.

The Court erred in refusing to make plaintiff's seventh proposed finding of fact.

XIII.

The Court erred in refusing to make plaintiff's eighth proposed finding of fact.

XIV..

The Court erred in refusing to make plaintiff's ninth proposed finding of fact.

XV.

The Court erred in refusing to make plaintiff's tenth proposed finding of fact.

XVI.

The Court erred in refusing to make plaintiff's eleventh proposed finding of fact.

XVII.

The Court erred in refusing to make plaintiff's twelfth proposed finding of fact.

XVIII.

The Court erred in refusing to make plaintiff's thirteenth proposed finding of fact.

XIX.

The Court erred in refusing to make plaintiff's fourteenth proposed finding of fact.

XX.

The Court erred in refusing to make plaintiff's fifteenth proposed finding of fact.

XXI.

The Court erred in refusing to make plaintiff's sixteenth proposed finding of fact.

XXII.

The Court erred in refusing to make plaintiff's seventeenth proposed finding of fact.

XXIII.

The Court erred in refusing to make plaintiff's eighteenth proposed finding of fact.

XXIV.

The Court erred in refusing to make plaintiff's nineteenth proposed finding of fact.

XXV.

The Court erred in refusing to make plaintiff's twentieth proposed finding of fact.

XXVI.

The Court erred in refusing to make plaintiff's twenty-first proposed finding of fact.

XXVII.

The Court erred in refusing to make plaintiff's twenty-second proposed finding of fact.

XXVIII.

The Court erred in refusing to make plaintiff's twenty-third proposed finding of fact.

XXIX.

The Court erred in refusing to make plaintiff's twenty-fourth proposed finding of fact.

XXX.

The Court erred in refusing to make plaintiff's twenty-fifth proposed finding of fact.

XXXI.

The Court erred in refusing to make plaintiff's twenty-sixth proposed finding of fact.

XXXII.

The Court erred in refusing to make plaintiff's twenty-seventh proposed finding of fact.

XXXIII.

The Court erred in refusing to make plaintiff's twenty-eighth proposed finding of fact.

XXXIV.

The Court erred in refusing to make plaintiff's twenty-ninth proposed finding of fact.

XXXV.

The Court erred in refusing to make plaintiff's thirtieth proposed finding of fact.

XXXVI.

The Court erred in refusing to make plaintiff's thirty-first proposed finding of fact.

XXXVII.

The Court erred in refusing to make plaintiff's thirty-second proposed finding of fact.

XXXVIII.

The Court erred in refusing to make plaintiff's thirty-third proposed finding of fact.

XXXIX.

The Court erred in refusing to make plaintiff's thirty-fourth proposed finding of fact.

XL.

The Court erred in refusing to make plaintiff's thirty-fifth proposed finding of fact.

XLI.

The Court erred in refusing to make plaintiff's thirty-sixth proposed finding of fact.

XLII.

The Court erred in refusing to make plaintiff's thirty-seventh proposed finding of fact.

XLIII.

The Court erred in refusing to make plaintiff's thirty-eighth proposed finding of fact.

XLIV.

The Court erred in refusing to make plaintiff's thirty-ninth proposed finding of fact.

XLV.

The Court erred in refusing to make plaintiff's first proposed conclusion of law.

XLVI.

The Court erred in refusing to make plaintiff's second proposed conclusion of law.

XLVII.

The Court erred in refusing to make plaintiff's third proposed conclusion of law.

XLVIII.

The Court erred in refusing to make plaintiff's fourth proposed conclusion of law.

XLIX.

The Court erred in refusing to make plaintiff's fifth proposed conclusion of law.

L.

The Court erred in refusing to make plaintiff's sixth proposed conclusion of law.

LI.

The Court erred in overruling plaintiff's objection to defendants' proposed finding of fact and in making said finding of fact.

LII.

The Court erred in making its first conclusion of law.

LIII.

The Court erred in making its second conclusion of law.

LIV.

The Court erred in making its third conclusion of law.

LV.

The Court erred in rendering judgment in favor of the defendants, dismissing the action with costs.

WHEREFORE, Plaintiff prays that said judgment of the District Court of the United States, for the Western District of Washington, Southern Division, be reversed, and for such other relief as may be proper in the premises.

Dated this November 7th, 1914.

GILTNER & SEWALL,
GUY C. H. CORLISS,
Attorneys for Plaintiff.

(Duly filed).

Petition for Writ of Error, with bond for the prosecution of the writ to effect in the sum of Five Hundred (\$500.00) Dollars, the bond being signed by M. A. Hackett and E. A. Hackett as sureties thereon.

Writ of Error duly issued and citation duly issued and served.

This record is printed pursuant to a stipulation of the parties to the cause by their attorneys of record.

Clerk's Certificate.

UNITED STATES OF AMERICA, }
WESTERN } ss.
DISTRICT OF WASHINGTON, }

I, FRANK L. CROSBY, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the above entitled cause as the same remains of record and on file in my office in said district at Tacoma, and that the same constitutes

the return on the annexed Writ of Error.

I further certify that I attached hereto and herewith transmit the original Writ of Error and original Citation, and original order extending time on Writ of Error.

I further certify that the following is a full, true and correct statement of all expenses, costs and fees, and charges incurred and paid in my office by and on behalf of the Plaintiff in Error, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fees (Sec. 828 R. S. U. S.)	
for making record, certificate or return, 461 folios @ 15c.....	\$69.15
Certificate of Clerk to transcript of record, etc. 2 folios @ 15c30
Seal to said certificate20
Statement of the cost of printing said transcript of record, collected and paid,	\$214.00

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Tacoma, in said District, this 2nd day of January, 1915.

(Seal)

FRANK L. CROSBY, Clerk,
By E. C. ELLINGTON,
Deputy Clerk.